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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 271

PARAMINO LUMBER COMPANY AND UNION INSURANCE SOCIETY OF CANTON, LTD., APPELLANTS,

vs.

WM. A. MARSHALL, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND JOHN T. CLARK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED AUGUST 7, 1939.

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[fol. 2]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 47

PARAMINO LUMBER COMPANY, a Corporation, and UNION INSURANCE SOCIETY OF CANTON, LTD., a Corporation, Complainants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and John T. Clark, Defendants

BILL OF COMPLAINT—Filed March 16, 1939

Come now the complainants above named, and file this, their Bill of Complaint herein, against the above named defendants, and allege:

I

That the complainant, Paramino Lumber Company, a corporation, is now and at all times herein mentioned, was a corporation organized and existing under and by virtue of the laws of the State of California, and an employer within the provisions of the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A., §§ 901 et seq.), hereinafter referred to as the "Act".

II

That the complainant, Union Insurance Society of Canton, Ltd., is now and at all times herein mentioned, was an insurance company organized as a corporation under and by virtue of the laws of Great Britain, and was and now is duly licensed to carry on its corporate business as a foreign corporation within the State of Washington, and has complied with the laws of said state pertaining to for-[fol. 3] eign corporations and corporations engaged in the insurance business within said state. That during all times

herein mentioned, said complainant, Union Insurance Society of Canton, Ltd., was an insurance carrier under the terms of said Act, and was and now is duly authorized to write compensation insurance covering employers and employees who are subject to and within the provisions of said Act, and at all times herein mentioned was the insurance carrier secured by the complainant, Paramino Lumber Company in accordance with the provisions of the said Act.

III

That the defendant, Wm. A. Marshall, is now and at all times herein mentioned, was the Deputy Commissioner for the Fourteenth Compensation District under the provisions of said Act, and is now and at all times herein mentioned, was a citizen and resident of the City of Seattle, State of Washington.

IV

That the defendant, John T. Clark, is now and at all times herein mentioned, was a citizen and resident of the State of Washington.

V

That at all times herein mentioned and now, a diversity of citizenship exists between complainants and defendants, Wm. A. Marshall and John T. Clark; the complainants, Paramino Lumber Company, a corporation, and Union Insurance Society of Canton, Ltd., being citizens and residents of the State of California and the Kingdom of Great Britain, respectively, and the defendants, Wm. A. Marshall and John T. Clark, being citizens and residents of the State of Washington.

VI

That this action is one within the original jurisdiction [fol. 4] of this court, in that:

(a) The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and the matter

(1) Arises under the constitution and laws of the United States, and

(2) Is between citizens of different states, as alleged in Paragraph V hereof.

(b) This action is one in equity authorized by law to be brought to redress the deprivation of a right secured by the laws and constitution of the United States providing for equal rights of citizens of the United States and persons within the jurisdiction of the United States.

VII

That the defendant, John T. Clark, was, on or about the 17th day of January, 1931, an employee of the complainant, Paramino Lumber Company, a corporation, within the provisions of the Act, and had been for some few hours before the occurrence of the injury complained of, engaged as a longshoreman on board the S. S. Dorothy Wintermote, then lying in the navigable waters in the harbor of the City of Seattle, in the State of Washington. That on said date, said John T. Clark suffered personal injuries in pursuance of his said employment, which injuries resulted in a fracture of the tenth rib on the left side, and caused temporary disability under the provisions of said Act. That thereafter, and upon application of said John T. Clark, a hearing on said claim was held on the 25th day of August, 1931, at the office of defendant, Wm. A. Marshall, at 452 Colman Building, Seattle, Washington, at the hour of two o'clock P. M., pursuant to the provisions of the Act, before said defendant, Wm. A. Marshall, as Deputy Commissioner, which said hearing resulted in the filing of a compensation order and award of compensation on the 26th day of August, [fol. 5] 1931, wherein it was found that said claimant, John T. Clark, was wholly disabled from January 17th, 1931, to and including July 4th, 1931, as the result of said injury claimed, and that said John T. Clark had recovered from his said injury and disability occasioned thereby on July 5th, 1931. That a true and correct copy of said compensation order and award is attached hereto, marked Exhibit "A", and by this reference made a part hereof and incorporated herein as though fully set forth, and all amounts required to be paid under said award have been paid to said defendant, John T. Clark, by these complainants.

VIII

That pursuant to the terms and provisions of said Act, said compensation order and award made and filed on the 26th day of August, 1931, became final at the expiration of

the thirtieth day thereafter. That no proceedings to review, suspend or set aside said award, in whole or in part, were brought by any party in interest against the Deputy Commissioner making said award or otherwise, as required by the terms and provisions of said Act, either within thirty days after the entry and filing of said award or otherwise, and that said award therefore became final as provided by law.

IX

That said compensation order and award having become final as provided by law, and the rights of the parties having been thus finally adjudicated and determined, and no proceedings having been instituted to review, suspend or set aside said award in whole or in part, within thirty days after the filing of said award as aforesaid, or at all, the Senate and House of Representatives of the United States of America, in the 74th Congress assembled, passed that certain Private Act entitled "An Act—For the relief of John T. Clark, of Seattle, Washington," which said act [fol. 6] was approved and signed by Franklin D. Roosevelt, President of the United States of America, on the 10th day of April, 1936, which said private act is numbered 445—74th Congress of the United States, and is in words and figures as follows, to-wit:

"(Private—No. 445—74th Congress)

(H. R. 4439).

AN ACT

For the relief of John T. Clark, of Seattle, Washington.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or

decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, That such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936."

X

That said Private Act 445—74th Congress (H. R. 4439), approved by the President April 10th, 1936, is unconstitutional, void and of no force and effect, and is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it denies to these complainants the equal protection of the laws of the United States enjoyed by others similarly situated and grants to the defendant, John T. Clark, special privileges not accorded equally to other employees under the Act, and deprives these complainants of their property without due process of law, all of which was so recognized by the United States Senate Committee on Claims in its report No. 1645 of the 74th Congress of the United States, first session, wherein, [fol. 7] among other matters, it is stated in reference thereto:

"Your Committee is frank to admit that it has had no other cases of this kind, and that as stated by the Employees' Compensation Commission, a private act of this nature might be successfully attacked by the employer or the insurance company in the courts."

That appended thereto are several letters from said United States Employees' Compensation Commission referred to, wherein it is stated in reference thereto:

"The proposed measure, quoted above, would no doubt be open to objection on constitutional grounds, among other things because of its discriminatory nature in that it would grant a special privilege not accorded equally to other employees under the act. It would also disturb vested rights. Similar State acts, so far as the Commission has noted, have uniformly been held unconstiutional or invalid, and in this connection the committee's attention is called to the following illustrative cases: *Casieri's case* (190 N. E. 118, Mass. 1934); and *Roles Shingle Company* v. *Bergerson* (19 Pac. (2d) 94, Oreg. 1933).

"Aside from the fact that the draft of the proposed bill would impose upon the Commission a function in this particular case which is in the nature of a duty imposed under the Longshoremen's Act upon its deputy commissioners, the constitutional infirmity of the measure would leave little doubt that any order issued thereunder would be successfully attacked in court by the employer or insurance carrier."

XI

That on or about the 17th day of June, 1936, defendant, Wm. A. Marshall, upon application of said John T. Clark and pursuant to said Private Act of Congress aforesaid, unlawfully ordered a further hearing on said claim to be held before said defendant as Deputy Commissioner of the Fourteenth Compensation District of the United States, Employees' Compensation Commission, at the office of the said Deputy Commissioner, 620 Federal Office Building, Seattle, Washington, on the 7th day of July, 1936, at one o'clock P. M., of said date. That a true and correct copy of said notice of hearing is attached hereto marked Exhibit "B" and by this reference made a part hereof and incorporated herein, as though fully set forth.

[fol. 8]

XII

That complainants, contending that said defendant, Wm. A. Marshall, was without jurisdiction or authority to take any further proceedings or action in connection with said claim, of any character whatsoever, under said Private Act set forth in Paragraph IX hereof or otherwise, and that said notice herein referred to and attached hereto as Exhibit "B" was issued by said defendant without lawful authority, and that the same was wholly void and contrary to law and the provisions of said Act, and that the same was unlawfully issued by said defendant pursuant to said unconstitutional Act of Congress set forth in Paragraph IX hereof, instituted an action in equity in this Court entitled: "Paramino Lumber Company, a corporation, and Union Insurance Society of Canton, Ltd., a corporation, Complainants, vs. Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, Defendants, John T. Clark, Intervening Defendant",

being cause No. 1147 of the records and files of the Clerk of this Court, which said records and files in said cause are hereby referred to and made a part hereof, as though fully set forth; that thereafter, an Order was entered dismissing complainants' said bill of complaint and amended bill of complaint in said cause, as more fully appears from the records and files of said cause, for the reasons set forth in the written decision of this Court reported in 18 Federal Supplement, at page 645, which said decision is hereby referred to and made a part hereof, as though fully set forth; that thereafter, complainants, feeling aggrieved at said order of dismissal and to preserve their right to challenge the constitutionality of said Private Act referred to in Paragraph IX hereof, appealed therefrom in the manner provided by law to the United States Circuit Court of Appeals, for the Ninth Circuit, which said Court, after [fol. 9] hearing, affirmed the order of this Court dismissing said bill of complaint and amended bill of complaint, for reasons more fully appearing in the decision of said United States Circuit Court of Appeals, for the Ninth Circuit, reported in 95 Federal (2d), at page 203, which said decision is hereby referred to and made a part hereof, as though fully set forth herein; that thereafter, the complainants, in the manner provided by law and rules of Court, made application to the Supreme Court of the United States for a writ of certiorari to review said decision of said United States Circuit Court of Appeals, for the Ninth Circuit, which said application for writ of certiorari was, on the 10th day of October, 1938, denied.

XIII

That thereafter, and on the 1st day of November, 1938, said defendant, Wm. A. Marshall, in compliance with the provision of said Private Act of Congress referred to more fully in Paragraph IX hereof, issued a notice of hearing on said claim to be held on the 22nd day of November, 1938, at 1:00 o'clock P. M., in the office of said defendant, Wm. A. Marshall, as Deputy Commissioner, 620 Federal Office Building, Seattle, Washington, a true and correct copy of which notice of hearing is attached hereto, marked Exhibit "C", and by this reference made a part hereof, as though fully set forth herein.

XIV

That pursuant to said notice, and over complainants' objections, a hearing on said claim was held by said defendant, Wm. A. Marshall, as Deputy Commissioner, witnesses having been sworn and testimony having been taken, and said hearing having been continued for the taking of further testimony to the 5th day of January, 1939, and further testimony having been taken on said date, said defendant, Wm. A. Marshall, on the 13th day of March, 1939, [fol. 10] issued from and filed in his office, a further compensation order and award of compensation under and pursuant to said Private Act of Congress, more fully referred to in Paragraph IX hereof, in which, among other things, it was found that said defendant, John T. Clark, as claimant therein, was wholly disabled from January 17th, 1931, to and including January 5th, 1939, for which he was entitled to 415-6/7 weeks' compensation at $11.54 per week, amounting to the sum of $4,798.99, and that the total disability of said defendant, John T. Clark, as claimant, continued at the time of the hearing on January 5th, 1939; that pursuant to the findings contained in said compensation order and award, said defendant, Wm. A Marshall, under authority of said Private Act of Congress more fully set forth in Paragraph IX hereof, made the following award:

"That the employer, SS 'Dorothy Wintermote' and/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd. shall pay to the claimant compensation as follows: 415-6/7 weeks' compensation at $11.54 per week covering the period from January 17, 1931, to and including January 5, 1939, and amounting to the sum of $4,798.99, less $200.00 to be deducted therefrom and paid Oscar A. Zabel as his attorney; that the employer shall have credit on this award for $331.20 previously paid to the claimant as compensation; that subsequent to January 5, 1939, the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of $11.54 per week; that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treatment as may be appropriate to the further treatment and cure of his disability."

That a true and correct copy of said compensation order and award is attached hereto, marked Exhibit "D", and by this reference made a part hereof and incorporated herein, as though fully set forth.

XV

That said defendant, Wm. A. Marshall, was and is without jurisdiction or authority to take any further proceedings or action in connection with said claim, of any character [fol. 11] whatsoever, and that said notices of hearing referred to and attached hereto as Exhibits "B" and "C", the holding of said hearings, and the said compensation order and award of compensation referred to and attached hereto as Exhibit "D", were issued, held and filed by said defendant, Wm. A. Marshall, without lawful authority, and the same are wholly void and contrary to law and the provisions of said Act; that all proceedings taken by the said defendant, Wm. A. Marshall, subsequent to the filing of that certain compensation order and award of compensation on the 26th day of August, 1931, referred to more fully in Paragraph VII hereof, were without lawful authority, and wholly void and contrary to law and the provisions of said Act.

XVI

That as a result of the aforesaid proceedings taken by said defendant, Wm. A. Marshall, in connection with said claim pursuant to said Private Act of Congress more fully referred to in Paragraph IX hereof, and more particularly, the unlawful issuance of said compensation order and award of compensation on the 13th day of March, 1939, requiring complainants to pay compensation to said defendant, John T. Clark, as provided in said compensation order and award, complainants will be thereby irreparably damaged and injured in the following particulars:

(a) That unless the payments required to be made under and pursuant to said compensation order and award of compensation issued and filed by said defendant, Wm. A. Marshall, on the 13th day of March, 1939, and made a part hereof as Exhibit "D", are forthwith enjoined and restrained, and said compensation order and award of compensation forthwith set aside and declared void, and said

Private Act of Congress set forth in Paragraph IX hereof declared unconstitutional and void for the reasons set forth in Paragraph X hereof, said complainants will be required [fol. 12] to pay to said defendant, John T. Clark, the sum of $4,467.79, and thereafter, the sum of $11.54 per week, until the full sum of $7,500.00 has been paid by complainants to said defendant, John T. Clark; that if complainants, on an appeal from said compensation order and award, or pending final decision herein, fail to secure an order staying payments thereunder, all or substantially all of said payments will be required to be made pending the final disposition of said appeal or review proceedings, and upon the successful termination of said appeal or review proceedings, or this proceeding, complainants will be unable to recover from the said defendant, John T. Clark, the amounts so paid, due to the fact that said defendant, John T. Clark, is insolvent and wholly without assets from which any judgment for such recovery may be satisfied; that if complainants, despite said compensation order and award, fail and refuse to comply therewith, and to pay the amounts provided therein within ten (10) days from and after the date said compensation order was filed, to-wit: ten days from and after the 13th day of March, 1939, no order staying the same being secured on an appeal therefrom, or in these proceedings, complainants will be required to pay, in addition to said amounts, an amount equal to twenty per cent thereof as a penalty; that complainants have no plain, speedy or adequate remedy at law to review and set aside said order and award of compensation, or to restrain and enjoin the payments of compensation required to be made thereunder;

(b) That said Private Act No. 445-74th Congress (H. R. 4439) is not a part of the Longshoremen's and Harbor Workers' Compensation Act, nor is it amendatory of or supplementary thereto, and complainants have no remedy by appeal or at law to obtain the relief sought herein, in that said Private Act No. 445-74th Congress (H. R. 4439) contains no provision or terms authorizing or permitting an appeal from any compensation order or award made by said [fol. 13] defendant, Wm. A. Marshall, in pursuance thereof, or any provision pursuant to which complainants could institute proceedings to set aside, review or suspend said award.

XVII

That said defendant, John T. Clark, is wholly insolvent and without funds, and unless a temporary restraining order be immediately entered by the Court restraining and staying the amounts of compensation required to be paid by said award made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true copy of which is attached hereto, marked Exhibit "D", and by reference made a part hereof, complainants will be required to pay to said John T. Clark, the amounts of compensation provided by said award within ten (10) days from and after the 13th day of March, 1939, or incur a penalty equal to twenty per cent of the amounts of compensation payable thereunder, and complainants will thereby lose the benefits of any favorable decision herein, and by reason thereof, will suffer irreparable damage and injury.

Wherefore, complainants pray as follows:

1. That a temporary restraining order be immediately issued restraining, enjoining and staying the amounts of compensation required to be paid by said award made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true and correct copy of which is attached hereto, marked Exhibit "D", and made a part hereof;

2. That said defendants be required to show cause on a date certain why a preliminary injunction enjoining, restraining and staying the amounts of compensation required to be paid by said award made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true [fol. 14] copy of which is attached hereto, marked Exhibit "D", should not issue during the pendency of this cause and until final decision herein;

3. And upon a hearing of said cause upon its merits, that a permanent injunction be issued by the Court, permanently restraining and enjoining all payments of compensation required to be made by said award made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true copy of which is attached hereto, marked Exhibit "D", and made a part hereof;

4. That upon a hearing of this cause upon its merits, that said Private Act of Congress No. 445-74th Congress (H. R.

4439), more particularly referred to and set forth in Paragraph IX hereof, be declared unconstitutional, void and of no force and effect, and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and that all proceedings by said defendant, Wm. A. Marshall, pursuant thereto, be declared unlawful and void, and that said compensation order and award issued by said defendant, Wm. A. Marshall, and filed in his office on the 13th day of March, 1939, above referred to and attached hereto as Exhibit "D", be set aside and declared void;

5. That said defendant, Wm. A. Marshall, and the United States Employees' Compensation Commission be permanently restrained and enjoined from taking any further proceedings or action in connection with said claim of John T. Clark, under or pursuant to said Private Act of Congress No. 445-74th Congress (H. R. 4439) set forth in Paragraph IX hereof, or otherwise;

6. That if deemed necessary or required, a three Judge Court be assembled to hear this cause on its merits pursuant to Title 28, U. S. C. A. Section 380a;

7. That complainants have such other, further or different relief as to the court may seem equitable and just, together [fol. 15] with costs of suit.

Bogle, Bogle & Gates, Stanley B. Long, Solicitors for Complainants.

Duly sworn to by Stanley B. Long. Jurat omitted in printing.

[fol. 16] EXHIBIT "A" TO COMPLAINT

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
FOURTEENTH COMPENSATION DISTRICT

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act

JOHN T. CLARK, Claimant,

against

SS. "DOROTHY WINTERMOTE" and/or PARAMINO LUMBER COMPANY, Employer, Union Insurance Society of Canton, Ltd., Insurance Carrier

Compensation Order, Award of Compensation, Case #104-19

Such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following Findings of Fact:

That on the 17th day of January, 1931, the claimant above named was in the employ of the employer above named at Seattle, in the State of Washington in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Union Insurance Society of Canton, Ltd.; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman on board the steamship "Dorothy Wintermote", said steamship being then afloat at Seattle, in the State of Washington; that while the claimant above named was so employed, he slipped and fell against a pile of lumber, sustaining a fracture of the 10th rib on the left side, and resulting in his disability; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act; that the average annual earnings of the

claimant herein at the time of his injury amounted to the sum of $900.00; that as the result of the injury sustained the claimant was wholly disabled from January 17, 1931, to and including July 4, 1931, and he is entitled to 24-1/7 weeks' compensation, $11.54 per week, for such disability; that the claimant had recovered from his injury on July 5, 1931; that the employer has paid $331.20 to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following award:

That the employer, SS "Dorothy Wintermote" and/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd., shall pay to the claimant compensation as follows: $278.61; that the em-
[fol. 17] ployer shall have credit on this Award for $331.20 previously paid to the claimant as compensation.

Given under my hand at Seattle, Washington, this 26th day of August 1931.

(S.) Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the Claimant, the Employer, and the Insurance Carrier at the last known address of each as follows:

Mr. John T. Clark, 808—7th Ave., Seattle, Washington.

SS "Dorothy Wintermote" and/or Paramino Lumber Co. #1 Drumm Street, San Francisco, California.

Union Insurance Society of Canton, Ltd., 1425 Dexter Horton Bldg., Seattle, Washington, % Mr. Pelly.

Mr. Samuel B. Bassett, 511 Alaska Bldg., Seattle, Washington.

Mailed August 26, 1931.

(S.) Wm. A. Marshall, Deputy Commissioner.

[fol. 18] EXHIBIT "B" TO COMPLAINT

UNITED STATES OF AMERICA, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Case No. 104-19

Bogle, Bogle & Gates, 611 Central Bldg., Seattle, Wn.

Mrs. Mary White-Bible, P. O. Box, Seattle, Wn.

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act

JOHN T. CLARK, Claimant,

against

"DOROTHY WINTERMOTE", Employer, UNION INS. SOCIETY OF CANTON, LTD., Insurance Carrier

Mr. John T. Clark, address % Oscar A. Zabel, 1001-24th & Pike Bldg., Seattle, Wn.,

And S. S. "Dorothy Wintermote", address #1 Drumm St., San Francisco, California,

And Union Insurance Society of Canton, Ltd., address % Balfour Guthrie & Company, Ltd., Seattle, Wn.

NOTICE OF HEARING

You are hereby notified that upon application made by Claimant, an interested party in the above-entitled claim, a hearing on such claim is hereby ordered, to be held before Wm. A. Marshall, Deputy Commissioner, 14th Compensation District of the United States Employees' Compensation Commission, at the office of the Deputy Commissioner, 620 Federal Office Bldg., in the City of Seattle, Washington, on the 7th day of July, 1936, at 1:00 P. M. of that day.

In testimony whereof, the undersigned, a Deputy Commissioner of the United States Employees' Compensation Commission, has hereunto set his hand at Seattle, Washington, this 17th day of June, 1936.

Wm. A. Marshall, Deputy Commissioner, 14th Compensation District.

[fol. 19] EXHIBIT "C" TO COMPLAINT

UNITED STATES EMPLOYEES COMPENSATION COMMISSION,
FOURTEENTH COMPENSATION DISTRICT

Case No. 104-19

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers Compensation Act.

JOHN T. CLARK, Claimant,

against

S. S. "DOROTHY WINTERMOTE" &/or PARAMINO LUMBER COMPANY, Employer, Union Insurance Society of Canton, Ltd., Insurance Carrier

NOTICE OF HEARING

In compliance with the provisions of Priv-e Act No. 445, 74th Congress, a hearing will be held at the office of the deputy commissioner, 620 Federal Office Building, Seattle, Washington, on November 22, 1938, at 1:00 o'clock, P. M.

Given under my hand at Seattle, Washington, this 1st day of November, 1938.

Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District.

Mr. John T. Clark, % Oscar Zabel, 4th & Pike Bldg., Seattle, Wn.

Mr. Oscar A. Zabel, 4th & Pike Bldg., Seattle, Wn.

S. S. Dorothy Wintermote &/or Paramino Lumber Co., #1 Drum St., San Francisco, Calif.

Bogle, Bogle & Gates, Central Bldg., Seattle, Wash.

Mrs. Mary White-Bible, 243 Central Bldg., Seattle, Wn.

[fol. 20] EXHIBIT "D" TO COMPLAINT

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
FOURTEENTH COMPENSATION DISTRICT

Case No. 104-19

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act.

JOHN T. CLARK, Claimant,

against

S. S. "DOROTHY WINTERMOTE" and/or PARAMINO LUMBER COMPANY, Employer, Union Insurance Society of Canton, Ltd., Insurance Carrier

COMPENSATION ORDER, AWARD OF COMPENSATION

By authority of the provisions contained in Private Act No. 445, 74th Congress, approved April 10, 1936, hearings were held by the Deputy Commissioner on November 22, 1938, and on January 5, 1939, and the Deputy Commissioner having been authorized by the United States Employees' Compensation Commission to make findings of fact and an order and award of compensation, and such an order or award of compensation as may be indicated by such findings,

The Deputy Commissioner makes the following Findings of Fact:

That on the 17th day of January, 1931, the claimant above named was in the employ of the employer above named at Seattle, in the State of Washington in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Union Insurance Society of Canton, Ltd.; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman on board the steamship "Dorothy Wintermote", said steamship being then afloat at Seattle, in the State of Washington; that while the claimant above named was so employed he slipped and fell against a pile of lumber, sus-

taining a fracture of the 10th rib on the left side, and resulting in his disability; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $900.00; that as the result of the injury sustained the claimant was wholly disabled from January 17, 1931, to and including January 5, 1939, and he is entitled to 415-6/7 weeks' compensation at $11.54 per week for such disability and amounting to the sum of $4,798.99; that the total disability of the claimant continued at the time of the hearing on January 5, 1939; that the employer has paid $331.20 to the claimant as compensation; that Oscar A. Zabel, attorney, has rendered legal services to claimant of the reasonable value of $200.00 and he is entitled to a lien on compensation due claimant therefor.

[fol. 21] Upon the foregoing facts the Deputy Commissioner makes the following Award:

That the employer, SS "Dorothy Wintermote" &/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd., shall pay to the claimant compensation as follows: 415-6/7 weeks' compensation at $11.54 per week covering the period from January 17, 1931, to and including January 5, 1939, and amounting to the sum of $4,798.99, less $200.00 to be deducted therefrom and paid Oscar A. Zabel as his attorney; that the employer shall have credit on this award for $331.20 previously paid to the claimant as compensation; that subsequent to January 5, 1939, the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of $11.54 per week; that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treatment as may be appropriate to the further treatment and cure of his disability.

Given under my hand at Seattle, Washington, this 13th day of March, 1939.

(Signed) Wm. A. Marshall, Deputy Commissioner,
Fourteenth Compensation District.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the

employer and the insurance carrier, at the last known address of each as follows:

Mr. John T. Clark, 220-9th Ave., Seattle, Wn.
SS "Dorothy Winternote" &/or Paramino Lumber Co., #1 Drumm St., San Francisco, Cal. Union Ins. Society of Canton, Ltd., % Bogle, Bogle, & Gates, Central Bldg., Seattle, Wn.
Oscar A. Zabel, Atty., 4th & Pike Bldg., Seattle, Wn.

(Signed) Wm. A. Marshall, Deputy Commissioner.

Mailed March 13, 1939.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

Civil Action File No. 47.

[Title omitted].

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Bogle, Bogle & Gates, plaintiff's attorney, whose address 604 Central Bldg., Seattle, Washington, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Elmer Dover, Clerk of Court, by Elmo Bell, Deputy Clerk. (Seal of Court.)

Date: March 16, 1939.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 23] RETURN ON SERVICE OF WRIT

No. 47

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Summons on the therein-named Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, by handing to and leaving a true and correct copy thereof with Jeannette McDonald, Secretary to Wm. A. Marshall, who was willing to accept same for him, personally at Seattle, Washington in said District on the 17th day of March, A. D. 1939.

A. J. Chitty, U. S. Marshal, by Patrick J. Bradley, Deputy.

Marshal's Fees $2.15.

(Endorsed: Filed Mar. 20, 1939). Elmer Dover, Clerk.

[fol. 24] RETURN ON SERVICE OF WRIT

No. 47

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Summons on the therein-named John T. Clark by handing to and leaving a true and correct copy thereof with him personally at Seattle, Washington in said District on the 17th day of March, A. D. 1939.

A. J. Chitty, U. S. Marshal, by Patrick J. Bradley, Deputy.

Marshal's fees $2.10.

(Endorsed: Filed Mar. 20, 1939. Elmer Dover, Clerk.)

[fol. 25] RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Summons on the therein-named J. Charles Dennis, U. S. District Attorney, by handing to and leaving a true and correct copy thereof with Annette Griffith, Secretary in Charge, U. S. Attorney's Office, personally at Seattle, Washington in said District on the 17th day of March, A. D. 1939.

A. J. Chitty, U. S. Marshal, by Patrick J. Bradley, Deputy.

Marshal's Fees $2.00.

(Endorsed: Filed Mar. 20, 1939. Elmer Dover, Clerk.)

[fol. 26] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 48

PARAMINO LUMBER COMPANY, a corporation, and UNION INSURANCE SOCIETY OF CANTON, LTD., a corporation, Complainants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and JOHN T. CLARK, Defendants

BILL OF COMPLAINT—Filed March 16, 1939

Come now the complainants above named, and file this, their Bill of Complaint herein, against the above named defendants, and allege:

I

That the complainant, Paramino Lumber Company, a corporation, is now and at all times herein mentioned, was a corporation organized and existing under and by virtue of the laws of the State of California, and an employer

within the provisions of the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A., §§ 901 et seq.), hereinafter referred to as the "Act".

II

That the complainant, Union Insurance Society of Canton, Ltd., is now and at all times herein mentioned, was an insurance company organized as a corporation under and by virtue of the laws of Great Britain, and was and now is duly licensed to carry on its corporate business as a foreign corporation within the State of Washington, and has complied with the laws of said state pertaining to foreign corporations and corporations engaged in the in- [fol. 27] surance business within said state. That during all times herein mentioned, said complainant, Union Insurance Society of Canton, Ltd., was an insurance carrier under the terms of said Act, and was and now is duly authorized to write compensation insurance covering employers and employees who are subject to and within the provisions of said Act, and at all times herein mentioned was the insurance carrier secured by the complainant, Paramino Lumber Company in accordance with the provisions of the said Act.

III

That the defendant, Wm. A. Marshall, is now and at all times herein mentioned, was the Deputy Commissioner for the Fourteenth Compensation District under the provisions of said Act, and is now and at all times herein mentioned, was a citizen and resident of the City of Seattle, State of Washington.

IV

That the defendant, John T. Clark, is now and at all times herein mentioned, was a citizen and resident of the State of Washington.

V

That the defendant, John T. Clark, was, on or about the 17th day of January, 1931, an employee of the complainant, Paramino Lumber Company, a corporation, within the provisions of the Act, and had been for some few hours before the occurrence of the injury complained of, engaged as a longshoreman on board the SS Dorothy Wintermote, then lying in the navigable waters in the harbor of the

City of Seattle, in the State of Washington. That on said date, said John T. Clark suffered personal injuries in pursuance of his said employment, which injuries resulted in a fracture of the tenth rib on the left side, and caused temporary disability under the provisions of said Act. [fol. 28] That thereafter, and upon application of said John T. Clark, a hearing on said claim was held on the 25th day of August, 1931, at the office of defendant, Wm. A. Marshall, at 452 Colman Building, Seattle, Washington, at the hour of two o'clock P. M., pursuant to the provisions of the Act, before said defendant, Wm. A. Marshall, as Deputy Commissioner, which said hearing resulted in the filing of a compensation order and award of compensation on the 26th day of August, 1931, wherein it was found that said claimant, John T. Clark, was wholly disabled from January 17th, 1931, to and including July 4th, 1931, as a result of said injury claimed, and that said John T. Clark had recovered from his said injury and disability occasioned thereby on July 5th, 1931. That a true and correct copy of said compensation order and award is attached hereto, marked Exhibit "A", and by this reference made a part hereof and incorporated herein as though fully set forth, and all amounts required to be paid under said award have been paid to said defendant, John T. Clark, by these complainants.

VI

That pursuant to the terms and provisions of said Act, said compensation order and award made and filed on the 26th day of August, 1931, became final at the expiration of the thirtieth day thereafter. That no proceedings to review, suspend or set aside said award, in whole or in part, were brought by any party in interest against the Deputy Commissioner making said award or otherwise, as required by the terms and provisions of said Act, either within thirty days after the entry and filing of said award or otherwise, and that said award therefore became final as provided by law.

VII

That said compensation order and award having become final as provided by law, and the rights of the parties having been thus finally adjudicated and determined, and no pro- [fol. 29] ceedings having been instituted to review, suspend or set aside said award in whole or in part, within thirty

days after the filing of said award as aforesaid, or at all, the Senate and House of Representatives of the United States of America, in the 74th Congress assembled, passed that certain Private Act entitled "An Act—For the relief of John T. Clark, of Seattle, Washington," which said act was approved and signed by Franklin D. Roosevelt, President of the United States of America, on the 10th day of April, 1936, which said private act is numbered 445-74th Congress of the United States, and is in words and figures as follows, to-wit:

"(Private—No. 445—74th Congress)

(H. R. 4439)

An Act For the relief of John T. Clark, of Seattle, Washington

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, That such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936."

VIII

That said Private Act 445-74th Congress (H. R. 4439), approved by the President April 10th, 1936, is unconstitutional, void and of no force and effect, and is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it denies to these complainants the equal protection of the laws of the United States enjoyed by others similarly situated and grants to

[fol. 30] the defendant, John T. Clark, special privileges not accorded equally to other employees under the Act, and deprives these complainants of their property without due process of law, all of which was so recognized by the United States Senate Committee on Claims in its report No. 1645 of the 74th Congress of the United States, first session, wherein, among other matters, it is stated in reference thereto:

"Your Committee is frank to admit that it has had no other cases of this kind, and that, as stated by the Employees' Compensation Commission, a private act of this nature might be successfully attacked by the employer or the Insurance company in the courts."

That appended thereto are several letters from said United States Employees' Compensation Commission referred to, wherein it is stated in reference thereto:

"The proposed measure, quoted above, would no doubt be open to objection on constitutional grounds, among other things because of its discriminatory nature in that it would grant a special privilege not accorded equally to other employees under the act. It would also disturb vested rights. Similar State acts, so far as the Commission has noted, have uniformly been held unconstitutional or invalid, and in this connection the committee's attention is called to the following illustrative cases: Casieri's case (190 N. E. 118, Mass. 1934); and Roles Shingle Company v. Bergerson (19 Pac. (2d) 94, Oreg. 1933).

"Aside from the fact that the draft of the proposed bill would impose upon the Commission a function in this particular case which is in the nature of a duty imposed under the Longshoremen's Act upon its deputy commissioners, the constitutional infirmity of the measure would leave little doubt that any order issued thereunder would be successfully attacked in court by the employer or insurance carrier."

IX

That thereafter, and on the 1st day of November, 1938, said defendant, Wm. A. Marshall, in compliance with the provision of said Private Act of Congress referred to more fully in Paragraph IX hereof, issued a notice of hearing on said claim to be held on the 22nd day of November, 1938,

at 1:00 o'clock P. M., in the office of said defendant, Wm. [fol. 31] A. Marshall, as Deputy Commissioner, 620 Federal Office Building, Seattle, Washington.

X

That pursuant to said notice, and over complainants' objections, a hearing on said claim was held by said defendant, Wm. A. Marshall, as Deputy Commissioner, witnesses having been sworn and testimony having been taken, and said hearing having been continued for the taking of further testimony to the 5th day of January, 1939, and further testimony having been taken on said date, said defendant, Wm. A. Marshall; on the 13th day of March, 1939, issued from and filed in his office, a further compensation order and award of compensation, under and pursuant to said Private Act of Congress, more fully referred to in Paragraph VII hereof, in which, among other things, it was found that said defendant, John T. Clark, as claimant therein, was wholly disabled from January 17th, 1931, to and including January 5th, 1939, for which he was entitled to 415-6/7 weeks' compensation at $11.54 per week, amounting to the sum of $4,798.99, and that the total disability of said defendant, John T. Clark, as claimant, continued at the time of the hearing on January 5th, 1939; that pursuant to the findings contained in said compensation order and award, said defendant, Wm. A. Marshall, under authority of said Private Act of Congress more fully set forth in Paragraph VII hereof, made the following award:

"That the employer, SS. "Dorothy Wintermote" and/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd. shall pay to the claimant compensation as follows: 415-6/7 weeks' compensation at $11.54 per week covering the period from January 17, 1931, to and including January 5, 1939, and amounting to the sum of $4,798.99, less $200.00 to be deducted therefrom and paid Oscar A. Zabel as his attorney; that the employer shall have credit on this award for $331.20 previously paid to the claimant as compensation; that subsequent to January 5, 1939, the employer and insurance carrier shall pay compensation to the claimant bi-weekly at [fol. 32] the rate of $11.54 per week; that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treatment as may be appropriate to the further treatment and cure of his disability."

That a true and correct copy of said compensation order and award is attached hereto, marked Exhibit "B", and by this reference made a part hereof and incorporated herein, as though fully set forth. That certified copies of the transcripts of the testimony taken at the hearings held before said Deputy Commissioner on August 25th, 1931, November 22nd, 1938, and January 5th, 1939, together with all Exhibits filed and received in evidence in connection therewith, will be filed in this cause under the certificate of said Deputy Commissioner, and is by this reference made a part hereof, as though fully set forth herein.

XI

That at all times following the expiration of thirty (30) days from and after the filing of said compensation order and award on the 26th day of August, 1931, hereinabove referred to and attached hereto, and made a part hereof as Exhibit "A", said defendant, Wm. A. Marshall, as Deputy Commissioner, was and is without jurisdiction or authority to take any further proceedings or action in connection with said claim, of any character whatsoever, and that the holding of said hearings on November 22nd, 1938, and January 5th, 1939, and the subsequent issuance of said compensation order and award of compensation filed March 13th, 1939, hereinabove referred to and attached hereto, and made a part hereof as Exhibit "B", were without lawful authority, and the same are wholly void and contrary to law and the provisions of said Act, in this:

1. That said compensation order and award of compensation filed by said defendant, Wm. A. Marshall, as Deputy Commissioner, in connection with said claim on the 26th day [fol. 33] of August, 1931, became final at the expiration of the thirtieth day thereafter, no proceedings to review, suspend or set aside said award, in whole or in part, having been brought by any party in interest against said Deputy Commissioner making said award, or otherwise, as required by the terms and provisions of said Act;

2. That said Private Act 445—74th Congress (H. R. 4439), more fully referred to in Paragraph VII hereof, and pursuant to which said compensation order and award was issued and filed by said Deputy Commissioner on March 13th, 1939, is unconstitutional, void and of no force and effect, and is in violation of the Fifth and Fourteenth

Amendments to the Constitution of the United States, in that it denies to these complainants the equal protection of the laws of the United States enjoyed by others similarly situated and grants to the defendant, John T. Clark, special privileges not accorded equally to other employees under the Act, and deprives these complainants of their property without due process of law;

3. That said compensation order and award of compensation issued and filed by said defendant, Wm. A. Marshall, as Deputy Commissioner, on March 13th, 1939, was issued and filed pursuant to said unconstitutional Private Act of Congress above referred to, was issued without lawful authority, and contrary to the provisions of said Act, and is therefore void and of no force or effect;

4. That there is no substantial, or any evidence upon which the Findings of Fact of said defendant, Wm. A. Marshall, as Deputy Commissioner, as set forth in said compensation order and award filed March 13th, 1939, and attached hereto as Exhibit "B", are or could be based;

5. That the action of said defendant, Wm. A. Marshall, as Deputy Commissioner, in making and filing said compensation order and award on March 13th, 1939, attached hereto [fol. 34] as Exhibit "B", is wholly arbitrary and capricious, and in so doing, the said defendant, Wm. A. Marshall, as Deputy Commissioner, entirely, completely and wilfully disregarded the positive, uncontradicted and credible testimony adduced at the hearings on said claim held on November 22nd, 1938, and January 5th, 1939;

6. That the action of said defendant, Wm. A. Marshall, as Deputy Commissioner, in issuing and filing said compensation order and award on March 13th, 1939, attached hereto as Exhibit "B", was contrary to law and the provisions of said Act, and contrary to the express rulings and opinions of the United States Employees' Compensation Commission, more particularly referred to and set forth in Paragraph VIII hereof;

7. That said defendant, John T. Clark, failed to sustain the burden of proving, or, in fact, offered any substantial testimony authorizing the entry of said findings of fact or said compensation order, or from which any findings of fact could be made to the effect that said defendant, John

T. Clark, was in anywise disabled as the result of his injury sustained on January 17th, 1931, from and after July 4th, 1931, to the date of the issuance and filing of said compensation order and award of March 13th, 1939, or any findings relating to continuing disability therein contained.

XII

That as a result of the aforesaid proceedings taken by said defendant, Wm. A. Marshall, in connection with said claim pursuant to said Private Act of Congress more fully referred to and set forth in Paragraph VII hereof, and more particularly, the unlawful issuance of said compensation order and award of compensation on the 13th day of March, 1939, requiring complainants to pay compensation to said defendant, John T. Clark, as provided in said com- [fol. 35] pensation order and award, complainants will be thereby irreparably damaged and injured in the following particulars:

(a) That unless the payments required to be made under and pursuant to said compensation order and award of compensation issued and filed by said defendant, Wm. A. Marshall, on the 13th day of March, 1939, and made a part hereof as Exhibit "B", are forthwith enjoined and restrained, and said compensation order and award of compensation forthwith set aside and declared void, and said Private Act of Congress set forth in Paragraph VII hereof declared unconstitutional and void, said complainants will be required to pay to said defendant, John T. Clark, the sum of $4,467.79, and thereafter, the sum of $11.54 per week, until the full sum of $7,500.00 has been paid by complainants to said defendant, John T. Clark; that if complainants, on an appeal from said compensation order and award, or in these proceedings to review and set aside said award, fail to secure an order staying payments thereunder, all or substantially all of said payments will be required to be made pending the final disposition of said appeal or review proceedings, and upon the successful termination of said appeal, or review proceedings, or this proceeding, complainants will be unable to recover from said defendant, John T. Clark, the amounts so paid, due to the fact that said defendant, John T. Clark, is insolvent and wholly without assets from which any judgment for such recovery may be satis-

fied; that if complainants, despite said compensation order and award, fail and refuse to comply therewith, and to pay the amounts provided therein within ten (10) days from and after the date said compensation order was filed, to-wit: ten days from and after the 13th day of March, 1939, no order staying the same being secured on an appeal therefrom, or review proceedings taken in connection therewith, [fol. 36] complainants will be required to pay, in addition to said amounts, an amount equal to twenty per cent thereof as a penalty, and that complainants will be required to pay said sums upon application of said defendant, John T. Clark, to this Court in the manner provided by law, and the provisions of said Act, and thereby suffer irreparable damage and injury.

XIII

That said defendant, John T. Clark, is wholly insolvent and without funds, and unless a temporary restraining order be immediately entered by the Court restraining and staying the amounts of compensation required to be paid by said award made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true copy of which is attached hereto, marked Exhibit "B", and by reference made a part hereof, complainants will be required to pay to said John T. Clark, the amounts of compensation provided by said award within ten (10) days from and after the 13th day of March, 1939, or incur a penalty equal to twenty per cent of the amounts of compensation payable thereunder, and complainants will thereby lose the benefits of any favorable decision herein, and by reason thereof, will suffer irreparable damage and injury.

Wherefore, complainants pray as follows:

1. That a temporary restraining order be immediately issued restraining, enjoining and staying the amounts of compensation required to be paid by said award made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true and correct copy of which is attached hereto, marked Exhibit "B", and made a part hereof;

2. That said defendants be required to show cause on a date certain why a preliminary or interlocutory injunction [fol. 37] enjoining, restraining and staying the amounts of

compensation required to be paid by said award made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true copy of which is attached hereto, marked Exhibit "B", should not issue during the pendency of this cause and until final decision herein;

3. And upon a hearing of said cause upon its merits, that a permanent injunction be issued by the Court, permanently restraining and enjoining all payments of compensation required to be made by said award made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true copy of which is attached hereto, marked Exhibit "B", and made a part hereof, and permanently restraining and enjoining said defendants, and each of them, from taking any action to enforce payment of the compensation provided by said compensation order and award of March 13th, 1939, or to compel complainants to make payment of the amounts provided thereunder;

4. That upon a hearing of this cause upon its merits, that said Private Act of Congress No. 445-74th Congress (H. R. 4439), more particularly referred to and set forth in Paragraph VII hereof, be declared unconstitutional, void and of no force and effect, and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and that all proceedings by said defendant, Wm. A. Marshall, pursuant thereto, be declared unlawful and void, and that said compensation order and award issued by said defendant, Wm. A. Marshall, and filed in his office on the 13th day of March, 1939, above referred to and attached hereto as Exhibit "B", be set aside and declared void, being contrary to law and the provisions of said Act;

5. That said defendant, Wm. A. Marshall, and the United [fol. 38] States Employees' Compensation Commission be permanently restrained and enjoined from taking any further proceedings or action in connection with said claim of John T. Clark, under or pursuant to said Private Act of Congress No. 445-74th Congress (H. R. 4439) set forth in Paragraph VII hereof, or otherwise;

5a. That if deemed necessary or required a three-judge Court be assembled to hear this cause on its merits pursuant to Title 28, U. S. C. A. Section 380a;

6. That complainants have such other, further or different relief as to the court may seem equitable and just, together with costs of suit.

Bogle, Bogle & Gates, Stanley B. Long, Solicitors for Complainants.

Duly sworn to by Stanley B. Long. Jurat omitted in printing.

[fols. 39-40] Exhibit "A" to complaint omitted. See exhibit "A", printed side page 16, ante.

[fol. 41] Exhibit "B" to complaint omitted. See exhibit "D", printed side page 20, ante.

[fol. 42] [File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

Civil Action File No. 48

[Title omitted]

SUMMONS

To the above named Defendant-:

You are hereby summoned and required to serve upon Bogle, Bogle & Gates, plaintiff's attorney-, whose address — 604 Central Building, Seattle, Washington, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Elmer Dover, Clerk of Court, by Elmo Bell, Deputy Clerk. (Seal of Court.)

Date: March 16, 1939.

NOTE.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 44] RETURN ON SERVICE OF WRIT

No. 48

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Summons on the therein-named Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, by handing to and leaving a true and correct copy thereof with Jeannette McDonald, Secretary to Wm. A. Marshall, who was willing to accept same for him, personally at Seattle, Washington in said District on the 17th day of March, A. D. 1939.

A. J. Chitty, U. S. Marshal, by Patrick J. Bradley, Deputy.

Marshal's Fees $2.06.

(Endorsed:) Filed Mar. 20, 1939. Elmer Dover, Clerk.

[fol. 45] RETURN ON SERVICE OF WRIT

No. 48

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Summons on the therein-named John T. Clark by handing to and leaving a true and correct copy thereof with him personally at Seattle, Washington in said District on the 17th day of March, A. D. 1939.

A. J. Chitty, U. S. Marshal, by Patrick J. Bradley, Deputy.

Marshal's Fees $2.06.

(Endorsed:) Filed Mar. 20, 1939. Elmer Dover, Clerk.

[fol. 46] RETURN ON SERVICE OF WRIT

No. 48

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Summons on the therein-named J. Charles Dennis, U. S. District Attorney, by handing to and leaving a true and correct copy thereof with Annette Griffith, Secretary in Charge, U. S. Attorney's Office, personally at Seattle, Washington in said District on the 17th day of March, A. D. 1939.

A. J. Chitty, U. S. Marshal, by Patrick J. Bradley, Deputy.

Marshal's Fees $2.00.

(Endorsed:) Filed Mar. 20, 1939. Elmer Dover, Clerk.

[fol. 47] IN UNITED STATES DISTRICT COURT

No. 47

[Title omitted]

NOTICE OF HEARING MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION—Filed March 16, 1939

To Wm. A. Marshall, defendant above named, and J. Charles Dennis, United States District Attorney, his Solicitor, and John T. Clark, defendant above named, and Oscar A. Zabel, his Solicitor:

You and Each of You will please take notice that the above named complainants will, on the 20th day of March, 1939, at 2:00 o'clock P. M., or as soon thereafter as counsel may be heard, bring on for hearing before the Honorable John C. Bowen, in his court room in the Federal Postoffice Building, Seattle, Washington, their hereto attached motion for temporary restraining order and preliminary injunction.

Bogle, Bogle & Gates, Stanley B. Long, Solicitors for Complainants.

[File endorsement omitted.]

[fol. 48] IN UNITED STATES DISTRICT COURT

No. 47

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION—Filed March 16, 1939

Come now the complainants above named, by their solicitors, Messrs. Bogle, Bogle & Gates and Stanley B. Long, and move the Court for an Order temporarily restraining and staying the amounts of compensation required to be paid under that certain compensation order and award of compensation made by said defendant, Wm. A. Marshall and filed in his office on March 13th, 1939, a true and correct copy of which is attached to complainants' bill of complaint herein and marked Exhibit "D" and made a part thereof, and further move the Court for the issuance and entry of a preliminary injunction restraining and staying the amounts of compensation required to be paid under that certain compensation order and award of compensation made by said defendant, Wm. A. Marshall and filed in his office on March 13th, 1939, a true and correct copy of which is attached to complainants' bill of complaint herein and marked Exhibit "D" and made a part thereof, during the pendency of this cause and pending final decision herein, upon the ground and for the reason that irreparable damage and injury [fol. 49] would otherwise ensue to the complainants.

These motions are based upon the verified bill of complaint herein.

Bogle, Bogle & Gates, Stanley B. Long, Solicitors for Complainants.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 48

NOTICE OF HEARING MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION—Filed March 16, 1939

To Wm. A. Marshall, defendant above named, and J. Charles Dennis, United States District Attorney, his Solicitor, and John T. Clark, defendant above named, and Oscar A. Zabel, his Solicitor:

You and Each of You will please take notice that the above-named complainants will, on the 20th day of March, 1939, at 2:00 o'clock, p. m., or as soon thereafter as counsel may be heard, bring on for hearing before the Honorable John C. Bowen, in his court room in the Federal Postoffice Building, Seattle, Washington, their hereto attached motion for temporary restraining order and preliminary injunction.

Bogle, Bogle & Gates, Stanley B. Long, Solicitors for Complainants.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 48

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION—Filed March 16, 1939

Come now the complainants above named, by their solicitors, Messrs. Bogle, Bogle & Gates and Stanley B. Long, and move the Court for an order temporarily restraining and staying the amounts of compensation required to be paid under that certain compensation order and award of compensation made by said defendant, Wm. A. Marshall and filed in his office on March 13th, 1939, a true and correct copy of which is attached to complainants' bill of complaint herein and marked Exhibit "B" and made a part thereof,

and further move the Court for the issuance and entry of a preliminary injunction restraining and staying the amounts of compensation required to be paid under that certain compensation order and award of compensation made by said defendant, Wm. A. Marshall and filed in his office on March 13th, 1939, a true and correct copy of which is attached to complainants' bill of complaint herein and marked Exhibit "B" and made a part thereof, during the pendency of this cause and pending final decision herein, upon the ground and for the reason that irreparable damage and injury would otherwise ensue to the complainants. [fol. 52] These motions are based upon the verified bill of complaint herein.

Bogle, Bogle & Gates, Stanley B. Long, Solicitors for Complainants.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

Civil Action, File No. 47

MOTION TO DISMISS—Filed March 21, 1939

Comes Now, John T. Clark, defendant above, and moves the Court to dismiss the Bill of Complaint herein on the ground and for the reason that the said Bill of Complaint does not state facts sufficient to constitute a cause of action and for the relief prayed for.

Oscar A. Zabel, Attorney for Defendant John T. Clark.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

Civil Action, File No. 48

MOTION TO DISMISS—Filed March 21, 1939

Comes Now, John T. Clark, defendant above, and moves the Court to dismiss the Bill of Complaint herein on the

ground and for the reason that the said Bill of Complaint does not state facts sufficient to constitute a cause of action and for the relief prayed for.

Oscar A. Zabel, Attorney for Defendant John T. Clark.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 47

TEMPORARY RESTRAINING ORDER—Filed March 23, 1939

This matter having come on duly and regularly for hearing before the court upon complainants' motion for temporary restraining order, and complainants having been represented by their solicitors, Bogle, Bogle & Gates and Stanley B. Long, and defendant, Wm. A. Marshall, having been represented by his solicitors, J. Charles Dennis, United States District Attorney, and Gerald Shucklin, Assistant United States District Attorney, and defendant, John T. Clark, having been represented by his solicitor, Oscar A. Zabel; and

It Appearing to the court from the verified bill of complaint herein, that a permanent injunction is sought by complainants suspending and restraining the enforcement, operation and execution of an Act of Congress set forth in said bill of complaint herein, upon the ground that such Act is repugnant to the Constitution of the United States, and the Court, pursuant to Title 28, U. S. C. A., Section 380a, having determined that said cause must be heard and determined by three judges, of whom at least one shall be a Circuit Judge; and

It Appearing to the court from the sworn testimony of [fol. 56] Stanley B. Long, one of the solicitors for complainants, that irreparable loss or damage would result to complainants unless a temporary restraining order is granted herein until hearing and determination of said cause by a three judge court provided for by Title 28, U. S. C. A., Section 380a, and the Court having found

from said sworn testimony, and from the verified bill of complaint herein, that said defendant, John T. Clark, is wholly insolvent and without funds, and that unless a temporary restraining order is forthwith entered herein, staying and restraining the amounts of compensation required to be paid by complainants to the defendant, John T. Clark, under that certain compensation order and award of compensation made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true and correct copy of which is attached to complainants' bill of complaint herein as Exhibit "D", during the pendency of this cause and until the hearing and determination thereof by said three judge court, complainants would be required to pay the amounts of compensation ordered under said award, and upon a determination of said cause favorable to complainants, said complainants would be unable to recover from said defendant, John T. Clark, the amounts so paid, due to the fact that said defendant, John T. Clark, is wholly insolvent and without funds from which any judgment for said recovery could be satisfied, and the Court having further found from said sworn testimony and verified bill of complaint herein, that if complainants, despite said compensation order and award, fail to comply therewith, and to pay the amounts provided therein, within ten days from and after the date said compensation order was filed by said Deputy Commissioner, to-wit: ten (10) days from and after the 13th day of March, 1939, complainants will be required to pay, in addition to said amounts, an amount equal to twenty per cent thereof as a penalty, which said amounts complainants would be unable to recover from said [fol. 57] defendant, John T. Clark, upon determination of said cause in their favor, and that complainants would suffer irreparable loss and damage thereby, and the Court deeming this to be a proper cause therefor, and being in the premises advised, it is now, therefore, hereby

Ordered Adjudged and Decreed: That all amounts of compensation required to be paid by complainants to defendant, John T. Clark, under that certain compensation order and award of compensation made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true and correct copy of which is attached to complainants' bill of complaint herein as Exhibit "D", be, and the same are hereby temporarily suspended, stayed, restrained and enjoined until a hearing and determination

of this cause is had by a three judge court, as provided for in Title 28, U. S. C. A., Section 380a, and

It is Further Ordered, Adjudged and Decreed: That said defendants, Wm. A. Marshall and John T. Clark, be, and they are hereby temporarily restrained and enjoined from applying for or taking other action for the enforcement of said compensation order and award made by said defendant, Wm. A. Marshall, as Deputy Commissioner, on the 13th day of March, 1939, a true copy of which is attached to complainants' bill of complaint herein as Exhibit "D", until a hearing and determination of this cause is had by a three judge court, as provided for in Title 28, U. S. C. A., Section 380a, and

It is Hereby Further Ordered, Adjudged and Decreed: That upon the filing herein by complainants of a bond in the sum of Five Thousand ($5,000.00) Dollars, approved by this court, conditioned to pay such costs and damages as said defendants, or either of them, may suffer as the result of the issuance of this restraining order, this restraining order [fol. 58] shall be and remain in effect until the hearing and determination of this cause is had by a three judge court, as provided for in Title 28, U. S. C. A., Section 380a, or until the further order of such three judge court.

Done in open court this 23rd day of March, 1939.

John C. Bowen, District Judge.

Approved as to form; Notice of presentation expressly waived:

J. Charles Dennis, U. S. District Attorney, Gerald Shucklin, Asst. U. S. District Attorney, Solicitors for defendant, Wm. A. Marshall. Oscar A. Zabel, Solicitor for defendant, John T. Clark.

[File endorsement omitted.]

[fol. 59] IN UNITED STATES DISTRICT COURT

No. 48

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed March 23, 1939

This matter having come on duly and regularly for hearing before the court upon complainants' motion for tem-

porary restraining order, and complainants having been represented by their solicitors, Bogle, Bogle & Gates and Stanley B. Long, and defendant, Wm. A. Marshall, having been represented by his solicitors, J. Charles Dennis, United States District Attorney, and Gerald Shucklin, Assistant United States District Attorney, and defendant, John T. Clark, having been represented by his solicitor, Oscar A. Zabel; and

It Appearing to the court from the verified bill of complaint herein, that a permanent injunction is sought by complainants suspending and restraining the enforcement, operation and execution of an Act of Congress set forth in said bill of complaint herein, upon the ground that such Act is repugnant to the Constitution of the United States, and the Court, pursuant to Title 28, U. S. C. A., Section 380a, having determined that said cause must be heard and determined by three judges, of whom at least one shall be a Circuit Judge; and

It Appearing to the court from the sworn testimony of Stanley B. Long, one of the solicitors for complainants, [fol. 60] that irreparable loss or damage will result to complainants unless a temporary restraining order is granted herein until hearing and determination of said cause by a three judge court provided for by Title 28, U. S. C. A., Section 380a, and the Court having found from said sworn testimony, and from the verified bill of complaint herein, that said defendant, John T. Clark, is wholly insolvent and without funds, and that unless a temporary restraining order is forthwith entered herein, staying and restraining the amounts of compensation required to be paid by complainants to the defendant, John T. Clark, under that certain compensation order and award of compensation made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true and correct copy of which is attached to complainant's bill of complaint herein as Exhibit "B", during the pendency of this cause and until the hearing and determination thereof by said three judge court, complainants will be required to pay the amounts of compensation ordered under said award, and upon a determination of said cause favorable to complainants, said complainants would be unable to recover from said defendant, John T. Clark, the amounts so paid, due to the fact that said defendant, John T. Clark, is wholly insolvent and without funds from which any judgment for

said recovery could be satisfied, and the Court having further found from said sworn testimony and verified bill of complaint herein, that if complainants, despite said compensation order and award, fail to comply therewith, and to pay the amounts provided therein, within ten days from and after the date said compensation order was filed by said Deputy Commissioner, to-wit: ten (10) days from and after the 13th day of March, 1939, complainants will be required to pay, in addition to said amounts, an amount equal to twenty per cent thereof as a penalty, which said amounts complainants would be unable to recover from said defendant, John T. Clark, upon determination of said cause [fol. 61] in their favor, and that complainants would suffer irreparable loss and damage thereby, and the Court deeming this to be a proper cause therefor, and being in the premises advised, it is now, therefore, hereby

Ordered, Adjudged and Decreed: That all amounts of compensation required to be paid by complainants to defendant, John T. Clark, under that certain compensation order and award of compensation made by said defendant, Wm. A. Marshall, and filed in his office on March 13th, 1939, a true and correct copy of which is attached to complainants' bill of complaint herein as Exhibit "B", be, and the same are hereby temporarily suspended, stayed, restrained and enjoined until a hearing and determination of this cause is had by a three judge court, as provided for in Title 28, U. S. C. A., Section 380a, and

It is Further Ordered, Adjudged and Decreed: That said defendants, Wm. A. Marshall and John T. Clark, be, and they are hereby temporarily restrained and enjoined from applying for or taking other action for the enforcement of said compensation order and award made by said defendant, Wm. A. Marshall, as Deputy Commissioner, on the 13th day of March, 1939, a true copy of which is attached to complainants' bill of complaint herein as Exhibit "B", until a hearing and determination of this cause is had by a three judge court, as provided for in Title 28, U. S. C. A., Section 380a, and

It is Hereby Further Ordered, Adjudged and Decreed: That upon the filing herein by complainants of a bond in the sum of Five Thousand ($5,000.00) Dollars, approved by this court, conditioned to pay such costs and damages as said defendants, or either of them, may suffer as the result of the issuance of this restraining order, this restraining

order shall be and remain in effect until the hearing and determination of this cause is had by a three judge court, as [fol. 62] provided for in Title 28, U. S. C. A., Section 380a, or until the further order of such three judge court.

Done in Open Court this 23rd day of March, 1939.

John C. Bowen, District Judge.

Approved as to form; Notice of presentation expressly waived:

J. Charles Dennis, U. S. District Attorney, Gerald Shucklin, Asst. U. S. District Attorney, Solicitors for defendant, Wm. A. Marshall, Oscar A. Zabel, Solicitor for defendant, John T. Clark.

[File endorsement omitted.]

[fols. 63-65] Bond on restraining orders for $5,000.00 approved and filed March 23, 1939, omitted in printing.

[fol. 66] In United States District Court

(Cause No. 47)

Stipulation as to Hearing

Now on this 28th day of March, 1939, Attorney Stanely Long appearing for the complainants, Gerald Shucklin, Assistant United States District Attorney appearing for Deputy Commissioner Wm. A. Marshall, attorney Oscar Zabel appearing for the defendant John T. Clark, counsel for the respective parties herein now stipulate that Judge Bowen may issue an order fixing the time of hearing and directing the Clerk to give the notice provided by statute of that hearing. Counsel also stipulate that counsel for the respective parties this day appearing have had the statutory five-day notice required, and agree that the hearing be had on Monday, April 24, 1939, at ten o'clock A. M., which date is now fixed by the Court for the hearing. Counsel also stipulate that the application for interlocutory injunction will be submitted on the pleadings, motions and briefs already filed and upon arguments of counsel without further or additional proof. The Clerk is directed to notify Judge Cushman by mail today of the date of hearing.

[fol. 67] IN UNITED STATES DISTRICT COURT

(Cause No. 48)

STIPULATION AS TO HEARING

Now on this 28th day of March, 1939, Attorney Stanely Long appearing for the complainants, Gerald Shucklin, Assistant United States District Attorney appearing for Deputy Commissioner Wm. A. Marshall, attorney Oscar Zabel appearing for the defendant John T. Clark, counsel for the respective parties herein now stipulate that Judge Bowen may issue an order fixing the time of hearing and directing the Clerk to give the notice provided by statute of that hearing. Counsel also stipulate that counsel for the respective parties this day appearing have had the statutory five-day notice required, and agree that the hearing be had on Monday, April 24, 1939, at ten o'clock A. M., which date is now fixed by the Court for the hearing. Counsel also stipulate that the application for interlocutory injunction will be submitted on the pleadings, motions and briefs already filed and upon arguments of counsel without further or additional proof. The Clerk is directed to notify Judge Cushman by mail today of the date of hearing.

[fol. 68] IN UNITED STATES DISTRICT COURT

No. 47

[Title omitted]

ORDER CONVOKING THREE-JUDGE COURT—Filed March 29, 1939

Plaintiffs employer and insurance carrier complaining that Private Act No. 445 of the 74th Congress (H. R. 4439) for the relief of defendant John T. Clark, approved April 10, 1936, and the compensation award pursuant thereto in defendant Clark's favor made March 13, 1939, by William A. Marshall, Deputy Commissioner for the Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A., Secs. 901 et seq.), are illegal, unconstitutional and void, in that such Private Act and award deny to plaintiffs the equal

protection of the laws and deprive them of their property without due process of law contrary to the Fifth and Fourteenth Amendments to the United States Constitution, and plaintiffs further alleging diversity of citizenship and jurisdictional amount and prospective irreparable injury seek temporary restrainer, interlocutory and permanent injunctive relief against said Private Act of Congress and said compensation award and a hearing before a 3-judge court [fol. 69] pursuant to the provisions of 28 U. S. C. A., Sec. 380 (a);

And such application for such interlocutory and permanent injunctive relief having been presented to the undersigned judge of the above entitled court, and the said undersigned judge having immediately thereupon requested the Senior Circuit Judge of the Ninth Circuit to designate two other judges to participate with the undersigned judge as a 3-judge court in hearing and determining such application; and thereupon said Senior Circuit Judge having immediately so designated two other judges for such purpose, to-wit: Honorable William Healy, United States Circuit Judge for the Ninth Circuit, and Honorable Edward E. Cushman, United States District Judge for the Western District of Washington in said Circuit, and by the provisions of said 28 U. S. C. A., Sec. 380(a) it being the duty of said two other judges so designated and of the undersigned judge as such 3-judge court to participate in such hearing and determination; now, therefore,

The undersigned judge does hereby call to his assistance said the Honorable William Healy and said the Honorable Edward E. Cushman to act with the undersigned judge as a 3-judge court pursuant to the requirements of 28 U. S. C. A., Sec. 380(a), and to hear and determine such applications and to hear and determine any and all other matters which may properly come before the court during the progress of the above entitled cause; and

By and with the advice and consent of the members of the court and upon stipulation of counsel for all interests appearing, the date and place of convening of said 3-judge court for the purpose of hearing the application for interlocutory injunction and such other matters as may properly [fol. 70] come before the court are hereby fixed on April 24, 1939, at the hour of 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, in the north court room of this court in the Post Office Building at Seattle, Wash-

ington, provided that the time and place of hearing such application may by order be changed should convenience require it; and

The undersigned judge being now advised by oral stipulation of counsel made in open court that the application for said interlocutory injunction will be submitted at said hearing upon the pleadings, motions, admissions and briefs already filed, made and appearing of record, and upon the arguments of counsel, without further or additional proof, it is further ordered that the Clerk forthwith mail to Judges Healy and Cushman each a copy of all of such pleadings, motions, briefs, and records and a copy of this order, and a copy of temporary restraining order, and that the attorneys of record for plaintiffs are hereby directed to forthwith furnish to the Clerk sufficient copies to enable the Clerk to comply with the foregoing order as to mailing.

It is further hereby ordered that the Clerk forthwith give notice of said hearing on April 24, 1939, and of the entry of this order to the Attorney General of the United States, Department of Justice, Washington, D. C., by forthwith mailing by registered mail to said Attorney General a certified copy of this order, and the attorneys of record for the plaintiffs are hereby ordered to pay to the Clerk the cost of such certified copy and of such registered mailing. Counsel for all parties appearing having heretofore in open court stipulated that all parties do now have actual notice of said hearing on April 24, 1939, the Clerk is hereby directed to [fol. 71] forthwith mail a copy of this order to each of the following:

1. Bogle, Bogle & Gates and Stanley B. Long, Attorneys for Plaintiffs, Seattle, Washington.

2. Oscar A. Zabel, Attorney for Defendant-Claimant John T. Clark, Seattle, Washington.

3. Honorable J. Charles Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney, Attorneys for Defendant William A. Marshall, Seattle, Washington.

Done in open court this 29th day of March, 1939.

John C. Bowen, United States District Judge.

[File endorsement omitted.]

[fol. 72] CERTIFICATE OF CLERK

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to direction of the Hon. John C. Bowen, District Judge, as contained in the attached order, I did, on March 29, 1939, forward to the Attorney General of the United States, Department of Justice, Washington, D. C., a certified copy of the attached order, by registered mail; and did further forward by mail uncertified copies of said order without registration to the following:

Hon. William Healy, United States Circuit Judge, San Francisco, California.

Hon. Edward E. Cushman, United States District Judge, Tacoma, Washington.

Bogle, Bogle & Gates and Stanley B. Long, 603 Central Building, Seattle, Washington.

Oscar A. Zabel, Esq., 1001 4th & Pike Bldg., Seattle, Washington.

Hon. J. Charles Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney, 222 Post Office Building, Seattle, Washington.

In Witness Whereof I have hereunto set my hand and affixed my official seal, this 29th day of March, 1939.

Elmer Dover, Clerk, by Truman Egger, Deputy.
(Seal.)

(Registry Receipt attached hereto.)

[fol. 73] IN UNITED STATES DISTRICT COURT

No. 48

[Title omitted]

ORDER CONVOKING THREE-JUDGE COURT—Filed March 29, 1939

Plaintiffs employer and insurance carrier complaining that after the defendant Clark, a longshoreman, was injured upon one of the employer's vessels in Seattle harbor waters and was under date of August 26, 1931, granted a compensation order and award under the Longshoremen's

and Harbor Workers' Compensation Act (Title 33, U. S. C. A., Secs. 901, et seq.) and that no proceedings were had to review, suspend, or set aside that award in whole or in part, the Senate and House of Representatives of the United States of America passed Private Act No. 445 of the 74th Congress, (H. R. 4439), approved April 10, 1936, for the relief of said John T. Clark and that pursuant to said Private Act defendant Marshall, Deputy Commissioner under said Longshoremen's and Harbor Workers' Compensation Act, under date of March 13, 1939, did make and enter a further compensation order and award of compensation in favor of said Clark, and further that the action of said Deputy Commissioner in so making said award of March 13, 1939, was wholly arbitrary and capricious and against the credible testimony adduced at the hearing and was in all respects illegal;

[fol. 74] And plaintiffs further alleging that said Private Act of Congress and said award of March 13, 1939, made pursuant thereto are under the Fifth and Fourteenth Amendments illegal, unconstitutional and void, seek a review of such acts of the Deputy Commissioner and a hearing upon all of the allegations of plaintiffs' complaint before a 3-judge court pursuant to the provisions of 28 U. S. C. A., Sec. 380(a), and seek a determination by such court that, as alleged by plaintiffs, said Private Act of Congress and said award of the Deputy Commissioner of March 13, 1939, made thereunder are illegal, unconstitutional and void and of no effect and seek temporary restrainer and interlocutory and permanent injunctive relief against said Private Act of Congress and said award;

And such application for such interlocutory and permanent injunctive relief and for such 3-judge court having been presented to the undersigned judge, and the said undersigned judge having immediately thereupon requested the Senior Circuit Judge of the Ninth Circuit to designate two other judges to participate with the undersigned judge as a 3-judge court in hearing and determining such application; and thereupon said Senior Circuit Judge having immediately so designated two other judges for such purpose, to-wit: Honorable William Healy, United States Circuit Judge for the Ninth Circuit, and Honorable Edward E. Cushman, United States District Judge for the Western District of Washington in said Circuit, and by the provisions of said 28 U. S. C. A., Sec. 380(a), it being the duty of said

two other judges so designated and of the undersigned judge as such 3-judge court to participate in such hearing and determination; now, therefore,

[fol. 75] The undersigned judge does hereby call to his assistance said the Honorable William Healy and said the Honorable Edward E. Cushman to act with the undersigned judge as a 3-judge court pursuant to the requirements of 28 U. S. C. A., Sec. 380(a), and to hear and determine such applications and to hear and determine any and all other matters which may properly come before the court during the progress of the above entitled cause; and

By and with the advice and consent of the members of the court and upon stipulation of counsel for all interests appearing, the date and place of convening of said 3-judge court for the purpose of hearing the application for interlocutory injunction and such other matters as may properly come before the court are hereby fixed on April 24, 1939, at the hour of 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, in the north court room of this court in the Post Office Building at Seattle, Washington, provided that the time and place of hearing such application may by order be changed should convenience require it; and

The undersigned judge being now advised by oral stipulation of counsel made in open court that the application for said interlocutory injunction will be submitted at said hearing upon the pleadings, motions, admissions and briefs already filed, made and appearing of record, and upon the arguments of counsel, without further or additional proof, it is further ordered that the Clerk forthwith mail to Judges Healy and Cushman each a copy of all of such pleadings, motions, briefs, and records and a copy of this order, and a copy of temporary restraining order, and that the attorneys of record for plaintiffs are hereby directed to forth-

[fol. 76] with furnish to the Clerk sufficient copies to enable the Clerk to comply with the foregoing order as to mailing.

It is further hereby ordered that the Clerk forthwith give notice of said hearing on April 24, 1939, and of the entry of this order to the Attorney General of the United States, Department of Justice, Washington, D. C., by forthwith mailing by registered mail to said attorney general a certified copy of this order, and the attorneys of record for the plaintiffs are hereby ordered to pay to the Clerk the

cost of such certified copy and of such registered mailing. Counsel for all parties appearing having heretofore in open court stipulated that all parties do now have actual notice of said hearing on April 24, 1939, the Clerk is hereby directed to forthwith mail a copy of this order to each of the following:

1. Bogle, Bogle & Gates and Stanley B. Long, Attorneys for Plaintiffs, Seattle, Washington.

2. Oscar A. Zabel, Attorney for Defendant-Claimant John T. Clark, Seattle, Washington.

3. Honorable J. Charles Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney, Attorneys for Defendant William A. Marshall, Seattle, Washington.

Done in open court this 29th day of March, 1939.

John C. Bowen, United States District Judge.

[fol. 77] CERTIFICATE OF CLERK

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to direction of the Hon. John C. Bowen, District Judge, as contained in the attached order, I did, on March 29, 1939, forward to the Attorney General of the United States, Department of Justice, Washington, D. C., a certified copy of the atttached order, by registered mail; and did further forward by mail ui certified copies of said order without registration to the following:

Hon William Healy, United States Circuit Judge, San Francisco, California; Hon Edward E. Cushman, United States District Judge, Tacoma, Washington; Bogle, Bogle & Gates and Stanley B. Long, 603 Central Building, Seattle, Washington; Oscar A. Zabel, Esq., 1001 4th & Pike Bldg., Seattle, Washington; Hon J. Charles Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney, 222 Post Office Building, Seattle, Washington.

In Witness Whereof I have hereunto set my hand and affixed my official seal, this 29th day of March, 1939.

Elmer Dover, Clerk, by Truman Egger, Deputy.

(Seal.)

(Registry Receipt attached to certificate in No. 47.)

[fol. 78] IN UNITED STATES DISTRICT COURT

Civil Action File No. 47

[Title omitted]

MOTION FOR JUDGMENT OF DISMISSAL ON THE PLEADINGS—Filed April 4, 1939

Comes Now, John T. Clark, defendant above named, and moves the Court for judgment of dismissal on the pleadings herein.

Oscar A. Zabel, Attorney for Defendant John T. Clark.

Copy Received, Apr. 4, 1939.

Bogle, Bogle & Gates.

[File endorsement omitted.]

[fol. 79] IN UNITED DISTRICT COURT

Civil Action File No. 48

[Title omitted]

MOTION FOR JUDGMENT OF DISSMISSAL ON THE PLEADINGS—Filed April 4, 1939

Comes Now, John T. Clark, defendant above named, and moves the Court for judgment of dismissal on the pleadings herein.

Oscar A. Zabel, Attorney for Defendant John T. Clark.

Copy received Apr. 4, 1939, Bogle, Bogle & Gates.

[File endorsement omitted.]

[fol. 80] IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OF HEARING

Now on this 24th day of April, 1939, Honorable William Healy, United States Circuit Judge, Honorable Edward E. Cushman, United States District Judge and Honorable John C. Bowen, United States District Judge, being present, constituting a statutory three-judge Court, under Title 28,

Section 380a, U. S. C. A., these causes come on for hearing before the Court on hearing on merits; hearing on complainants' application for interlocutory or permanent injunction; hearing on motion of the defendant, John T. Clark to dismiss (Filed March 21, 1939) and hearing on motion of defendant John T. Clark for judgment of dismissal on the pleadings, (filed April 4, 1939). The causes are called for hearing. Both sides are ready. Counsel present are Attorney Stanley Long, of the law firm of Bogle, Bogle & Gates appearing for the complainants, Gerald Shucklin, Assistant United States District Attorney appearing for Wm. A. Marshall, Deputy Commissioner, Attorney Oscar A. Zabel appearing for defendant John T. Clark. Preliminary statements are made by attorney Long, during the course of which complainants move orally that, in view of a recent Circuit Court opinion, these cases be transferred to the Admiralty side of the Court and be there heard, the motions to dismiss to be considered as exceptions. Opposing counsel offer no objection, and the motion is taken under advisement. Attorney Long now moves that these two cases be consolidated for the purpose of this hearing, and the motion is granted. Attorney Shucklin, appearing on behalf of Defendant Marshall, advises the Court that the Government desires to make no argument in this matter. Argument of Attorneys Long and Zabel is heard, and the matter is taken under advisement. • • •

[fol. 81] In United States District Court, Western District of Washington, Northern Division

In Admiralty Nos. 47 and 48

Paramino Lumber Company, a corporation, and Union Insurance Society of Canton, Ltd., a corporation, Libelants,

vs.

Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and John T. Clark, Respondents

Bogle, Bogle & Gates and Stanley Long, Seattle, Washington, Attorneys for Libelants.

J. Charles Dennis, United States Attorney, Seattle, Washington, Gerald Shucklin, Asst. United States Attorney, Seattle, Wash., Attorneys for Respondent Marshall.

Oscar A. Zabel, Seattle, Washington, Attorney for Respondent Clark.

Before Healy, Circuit Judge, and Cushman and Bowen, District Judges.

MEMORANDUM OPINION—Filed May 10, 1939

[fol. 82] Some of the historical background of these cases may be found in the decisions of the District Court, 18 F. Supp. 645, and of the Ninth Circuit Court of Appeals, 95 F. (2nd) 203.

These are two consolidated suits in admiralty before this 3-judge court, convoked pursuant to 28 U. S. C. A., Sec. 380a, brought by libelants employer and insurance carrier against respondents Deputy Commissioner and John T. Clark for temporary, interlocutory and permanent injunctive relief against Private Act No. 445 of the 74th Congress (H. R. 4439) for the relief of John T. Clark, and against a supplemental order and award of compensation of more than $4,000 made under that Private Act to Clark, a longshoreman, upon the alleged ground that the Private Act and award are illegal, unconstitutional and void, in that they (as Libelants allege) deny to libelants the equal protection of the laws and deprive them of their property without due process of law contrary to the Fifth and Fourteenth Amendments.

Cause No. 47 was commenced as an independent equity suit and Cause No. 48 was commenced as a suit for review by the District Court of the Deputy Commissioner's supplemental award. The causes have been consolidated and transferred to the admiralty side of the court. Both seek the same injunctive relief above noted. Respondents except to the libels on the ground that the libels do not state sufficient facts for the relief demanded. The sole question for decision is whether the Private Act is constitutional and a valid amendment to the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. A., Secs. 901, et seq.). Respondents contend that it is valid because it affects only the remedy and not the right of John T.

[fol. 83] Clark. Libelants insist that the Private Act is unconstitutional and void because the rights of the parties had been fixed by a previous binding award of compensation which cannot be changed by the effect of the Private Act giving as it does private relief only to Clark and to no one else similarly situated.

The questioned Private Act of Congress provides as follows:

"An Act

For the relief of John T. Clark, of Seattle, Washington

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That, in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, that such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936."

Bowen, District Judge:

Much of what is stated in the following quotations was said with reference to state statutes, but the principles stated apply equally to Acts of Congress.

"A presumption in favor of constitutionality is raised by the mere fact of the enactment of a statute by the legislature; and the burden of showing that it is unconstitutional is on the party asserting it. * * *" 12 C. J. 791-794. "As to the degree and extent of this presumption, the rule, as variously stated, is that every reasonable presumption will be made in favor of the validity of a statute: * * * and [fol. 84] also that doubt, a fair doubt, a serious doubt, any, and all, doubts, and every reasonable doubt as to the constitutionality of a statute will be resolved in favor of its validity; * * *." 12 C. J. 794-795. "* * * Other state-

ments are that, where doubt exists whether there is a conflict between the statute and the constitution, the statute must prevail, and that the statute must be upheld unless its invalidity appears beyond all doubt, * * *." 12 C. J. 798.

In Williams vs. Norris, 25 U. S. 72, (12 Wheat. 117), one question was which one of two persons had the paramount title in certain lands. Norris claimed that his title was perfected by proceedings under a statute of the state of Tennessee entitled "an act for the relief of Ezekiel Norris", which provided; "Be it enacted", etc., "that the commissioner of West Tennessee be, and he is hereby authorized to issue to Ezekiel Norris, certificates or warrants to the amount of 2,280 acres, being the amount of two entries, No. 2,046 for 1,000 acres and No. 2,047 for 1,280 acres, on which no warrants or grants were issued; provided, that the said Ezekiel Norris shall produce sufficient evidence to the said commissioner that the consideration for said entries was paid, and that no warrant or grant ever issued on said entries."

Williams contended that statute was unconstitutional, but the court overruled that contention and at pages 80-81 (12 Wheat. 127-128) by Marshall, C. J., said: "What difference is there, so far as respects its constitutionality, between the act passed in his (Norris') particular case, and the act containing a general reference of all cases of the same description to the commissioner? * * * There are, undoubtedly, great and solid objections to legislation for particular cases. [fol. 85] But these objections do not necessarily make such legislation repugnant to the constitution of the United States."

That old case of Williams v. Norris, supra, decided in 1827, may be somewhat involved on the facts, but it is clear that in that case Chief Justice Marshall overruled the constitutional objection to a private act of a state legislature for the perfection of one man's title to land against the adverse claims of another man, and held in effect that the fact that legislation is for the private relief of one man in his relationship with another does "not necessarily make such legislation repugnant to the constitution of the United States". Counsel have not cited and the writer of this opinion is not advised of any later Supreme Court case overruling that judgment of Marshall. That situation, until unmistakably cleared up by later Supreme Court decision, renders this three-judge District Court unable to rule with-

out doubt that the Private Act of Congress for the relief of John T. Clark here assailed is unconstitutional. Since its invalidity is not so free from doubt as to overcome the presumption of its validity, the Private Act must be upheld by this court.

The exceptions to the libels will be sustained. An order or orders carrying the foregoing ruling into effect may be settled upon notice or stipulation.

——— ———, Circuit Judge; Edward E. Cushman, District Judge; John C. Bowen, District Judge.

[File endorsement omitted.]

[fol. 86] In United States District Court

In Admiralty Nos. 47 and 48

[Title omitted]

Dissenting Opinion—Filed May 10, 1939

Healy, Circuit Judge, dissenting:

I regret my inability to agree with my associates, but the invalidity of the private act does not seem to me doubtful.

The beneficiary of the act, Clark, was injured in January, 1931, while in the employ of the libellant Paramino Lumber Company. A claim for compensation was filed by Clark. Upon hearing before the deputy commissioner in August, 1931, an award of compensation was made in which it was determined that the claimant had been wholly disabled from the time of the injury to July 5, 1931, but had recovered from his injury and disability on the latter date. The employer and the insurance carrier paid compensation for the period of disability, pursuant to the order. Under the terms of the Longshoremen's Act (Sec. 21 (a); 33 U. S. C. A. Sec. 921 (a)) the compensation order became final at the expiration of thirty days thereafter, there having been no pro- [fol. 87] ceeding to suspend or set it aside.

So far as material here, Sec. 22 of the Longshoremen's Act, in effect then as now, provides that upon his own initiative, or upon the application of any party in interest, on the ground of a change in condition or because of mistake in a determination of fact, the deputy commissioner may

review a compensation case, at any time prior to one year after the date of the last payment of compensation, and may issue a new compensation order continuing, reinstating or increasing compensation. No review was had of the case as permitted by this provision. On April 10, 1936 Congress passed the private act in question. The original order confessedly involved no fraud, and it is conceded that the award now sought to be enjoined was made solely under authority of the special act.

There are doubtless many instances in which injured longshoremen have found themselves in the unfortunate plight of Mr. Clark. Compare, for example, the facts in Kobilkin v. Pillsbury, 9 Cir., — F. (2nd) —. I cannot but believe that the private act, singling out as it does the libellants for the imposition of a burden not imposed by Congress on others in like situation, impinges on their constitutional rights guarante[illegible] by the due process clause of the Fifth Amendment. The arbitrary nature of the act is [fol. 88] unrelieved by any asserted distinction which might serve to differentiate the obligation of these parties from that of other employers or insurance carriers in like circumstances. What Congress has done is to authorize an award of money for the relief of a private individual, payable not out of the public treasury, but out of the pockets of other private parties guilty of no fault. The statute involved in Williams v. Norris, 25 U. S. 72, appears to have been purely remedial, and I see nothing in that decision which would support this legislation.

I think the statute is invalid on grounds apart from the frailties just discussed. It purports to extend or remove the time limits imposed by Secs. 21 and 22 of the Longshoremen's Act, and is applicable only in a case where these time limits had already expired. In Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U. S. 633, the court dealt with a parallel situation. It was there pointed out that the Interstate Commerce Act created a cause of action against the carrier (in that case the right to damages for misrouting) and at the same time operated as a limitation upon liability. It was held that in the case of such statutory causes of action the lapse of the time limit not only bars the remedy but destroys the liability; and to give the statute a retroactive effect would be to deprive the carrier of its property without due process of law in contravention of the Fifth Amendment.

[fol. 89] Similarly, the Longshoremen's Act (Sec. 4) creates a cause of action for compensation, irrespective of fault. It also limits the time within which an award of additional compensation may be made by the deputy commissioner. This period had expired prior to the enactment of the private act here in question. As of the latter date liability no longer existed. Thus the act not only supplies a remedy but necessarily imports the creation of a new liability.

It would seem that the principle of the Danzer case is equally applicable to general and to private statutes, however free from other infirmities the latter may be.

I think the restraining order heretofore granted should be made permanent.

William Healy, U. S. Circuit Judge.

[File endorsement omitted.]

[fol. 90] In United States District Court, Western District of Washington, Northern Division

In Admiralty

(Consolidated Causes)

No. 47

No. 48

[Title omitted]

Final Decree—Filed June 9, 1939

The above entitled causes having been, and being hereby, consolidated for all purposes, including hearing and appeal, and having been, and being hereby, transferred to the admiralty side of this court, and having come on duly and regularly for hearing on the 24th day of April, 1939, before the undersigned, William Healy, U. S. Circuit Judge, Edward E. Cushman and John C. Bowen, U. S. District Judges, sitting in admiralty as a three-judge court convoked pur-

[fol. 91] suant to Title 28 U. S. C. A., Section 380a, upon

the exceptions of the respondent, John T. Clark, on the ground that the libels herein do not state sufficient facts for the relief demanded, the sole question raised by said exceptions for decision by this court relating to the constitutionality of that certain Private Act No. 445 of the 74th Congress of the United States (H. R. 4439), set forth in the libels herein, and at the conclusion of oral argument herein, the court having taken said consolidated causes under advisement for determination and decision, and the undersigned, Edward E. Cushman and John C. Bowen, U. S. District Judges, having on the 10th day of May, 1939 filed their written memorandum decision as a majority of this three-judge court sustaining the exceptions of said respondent, John T. Clark, to said libels, and the undersigned, William Healy, U. S. Circuit Judge, having on said date filed his dissenting opinion in said causes holding that the exceptions to said libels should be denied and the restraining orders heretofore entered herein made permanent, and the court being in the premises fully advised, it is now, therefore, by the majority of this Court, William Healy, Circuit Judge dissenting, hereby

Ordered, Adjudged and Decreed as follows:

(1) That the exceptions of the respondent, John T. Clark, to the libels in the above entitled and numbered consolidated causes be, and the same are hereby sustained.

(2) That the applications of the libelants, and each of them, in the above entitled and numbered consolidated causes for an interlocutory or permanent injunction be, and the same are, hereby denied.

(3) That the libels in the above entitled and numbered consolidated causes be, and the same are hereby dismissed with prejudice and costs in favor of the respondents.

[fol. 92] (4) That the temporary restraining orders heretofore entered in the above entitled and numbered consolidated causes on the 23rd day of March, 1939, and the bond thereon, shall be and remain in full force and effect for a period of thirty (30) days from and after the date of entry and filing of this decree, and in the event an appeal be taken by libelants from this decree within said period, then said temporary restraining orders and bond thereon shall be and remain in full force and effect until the Supreme

Court of the United States has made its final disposition of said appeal.

Done at Seattle, Washington, this 5th day of June, 1939.
Edward E. Cushman, U. S. District Judge.

Done at Seattle, Washington, this 5th day of June, 1939.
John C. Bowen, U. S. District Judge.

Done at San Francisco, California, this 7th day of June, 1939.
William Healy, U. S. Circuit Judge.

EXCEPTIONS

Libelants, and each of them, except to the foregoing final decree as follows:

1. Except to paragraph (1) of the foregoing final decree sustaining the exceptions of the respondent John T. Clark to the libels in the above entitled and numbered consolidated causes.

2. Except to paragraph (2) of the foregoing final decree denying libelants' applications, and each of them, in the above entitled and numbered consolidated causes for an interlocutory or permanent injunction therein.

[fol. 93] 3. Except to paragraph (3) of the foregoing final decree dismissing the libels in the above entitled and numbered consolidated causes with prejudice and with costs in favor of respondents.

Libelants' foregoing exceptions to this final decree, and each of them, be and the same are hereby allowed.

Done at Seattle, Washington, this 5th day of June, 1939.
Edward E. Cushman, U. S. District Judge.

Done at Seattle, Washington, this 5th day of June, 1939.
John C. Bowen, U. S. District Judge.

Done at San Francisco, California, this 7th day of June, 1939.
William Healy, U. S. Circuit Judge.

Stipulated and approved for entry without further notice. Oscar A. Zabel, Proctor for respondent, John T.

Clark. J. Charles Dennis, U. S. District Attorney. Gerald Shucklin, Assistant U. S. District Attorney, Proctors for Wm. A. Marshall, Deputy Commissioner.

Presented by: Stanley B. Long, Of Bogle, Bogle & Gates, Proctors for Libelants.

[File endorsement omitted.]

[fol. 94] IN UNITED STATES DISTRICT COURT

In Admiralty

(Consolidated Causes)

No. 47

No. 48

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 24, 1939

To the Honorable William Healy, United States Circuit Judge, Edward E. Cushman and John C. Bowen, District Judges, Sitting in admiralty as a Three-Judge Court, convoked pursuant to Title 28 U. S. C. A., Section 380a:

The above named libelants in the above entitled and numbered consolidated causes, feeling aggrieved by the final decree herein sustaining the exceptions of the respondent John T. Clark to the libels herein, denying libelants' applications herein for an interlocutory or permanent injunction, [fol. 95] and dismissing said libels with prejudice and with costs in favor of the respondents, made and entered in the above entitled and numbered consolidated causes on the 9th day of June, 1939, do hereby appeal from the said decree, and each and every part thereof, to the Supreme Court of the United States, for the reasons set forth in the Assignment of Errors filed herewith, and pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said final decree was based, duly authenticated, be sent to the Supreme Court of the United States

under the rules of such court in such cases made and provided, and your petitioners further pray that the temporary restraining orders heretofore entered in the above entitled and numbered consolidated causes on the 23rd day of March, 1939, and the bond thereon, be and remain in full force and effect until the Supreme Court of the United States shall have made its final disposition of said appeal.

Paramino Lumber Company, a corporation, and Union Insurance Society of Canton, Ltd., a Corporation, Appellants, by Bogle, Bogle & Gates, Stanley B. Long, Edward G. Dobrin, Their Proctors.

In United States District Court

Order Allowing Appeal, Continuing Temporary Restraining Orders and Fixing Bond—Filed June 24, 1939

Appeal of the above entitled and numbered consolidated causes to the Supreme Court of the United States is hereby allowed upon giving cost bond as required by law in the penal sum of $1,000.00, and the temporary restraining [fols. 96-98] orders heretofore entered in the above entitled and numbered consolidated causes on the 23rd day of March, 1939, and the bond thereon in the sum of $5,000.00 shall be and remain in full force and effect until the Supreme Court of the United States shall have made its final disposition of said appeal.

Done at Tacoma, Washington, this 20th day of June, 1939.

Edward C. Cushman, United States District Judge.

Done at Seattle, Washington, this 19th day of June, 1939.

John C. Bowen, United States District Judge.

Done at San Francisco, California, this 22nd day of June, 1939.

William Healy, United States Circuit Judge.

Copy received, amount of cost bond approved, and notice of presentation waived this 19th day of June, 1939. J. Charles Dennis, U. S. District Attorney; Gerald Shucklin, Assistant U. S. District Attorney, Proctors for Wm. A.

Marshall, Deputy Commissioner. Oscar A. Zabel, Proctor for respondent, John T. Clark.
Presented by: Stanley B. Long.

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT

No. 47

No. 48

In Admiralty (Consolidated Causes)

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 24, 1939

Come now the libelants in the above entitled and numbered consolidated causes and file the following assignment of errors, upon which they will rely in their presentation of the appeal to the Supreme Court of the United States from the final decree made and entered by this Honorable Three-Judge Court, convoked pursuant to Judicial Code, Section 266, as amended by Act of August 24, 1937, Chapter 754, Section 3, 50 Stat. 752, Title 28 U. S. C. A., Sec. 380a, sus-
[fol. 100] taining exceptions of the respondent John T. Clark to the libels in the above entitled and numbered consolidated causes, denying libelants' applications for an interlocutory or permanent injunction therein, and dismissing said libel with prejudice and costs in favor of respondents:

1. That the United States District Court for the Western District of Washington, Northern Division, erred in granting and in not denying and overruling the exceptions of the respondent John T. Clark to said libels herein, and each of them, in that it appears from said libels and each of them that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought herein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the respondent Wm. A. Marshall, as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act purported to have obtained authority to and did review the compensation order and award of compensation of August

26, 1931, and pursuant to which said respondent purported to have obtained authority to and did issue and file a supplemental compensation order and award of compensation on the 13th day of March, 1939, is unconstitutional and void, being in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in granting to respondent John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and in depriving libelants of their property without due process of law.

2. That the United States District Court for the Western District of Washington, Northern Division, erred in denying and not granting the applications of the libelants, and each of them, for an interlocutory or permanent injunction in [fol. 101] the above entitled and numbered consolidated causes, in that it appears from said libels and each of them that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the respondent Wm. A. Marshall, as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931, and pursuant to which said respondent purported to have obtained authority to and did issue and file a supplemental compensation order and award of compensation on the 13th day of March, 1939, is unconstitutional and void, being in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in granting to respondent John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and in depriving libelants of their property without due process of law.

3. That the United States District Court for the Western District of Washington, Northern Division, erred in dismissing the above entitled and numbered consolidated causes and the libels therein, and each of them, in that it appears from the libels and each of them that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the respondent Wm. A. Marshall,

as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931, and pur- [fols. 102-121] suant to which said respondent purported to have obtained authority to and did issue and file a supplemental compensation order and award of compensation on the 13th day of March, 1939, is unconstitutional and void, being in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in granting to respondent John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and in depriving libelants of their property without due process of law.

Wherefore, libelants pray that said final decree be reversed and that an interlocutory or permanent injunction issue against respondents, and each of them, as prayed for in said libels, and that said United States District Court for the Western District of Washington, Northern Division, be directed to reverse and set aside said final decree, overrule said exceptions of the respondent John T. Clark, and to enter a decree in said libels as prayed for therein.

Bogle, Bogle & Gates, Stanley B. Long, Edward G. Dobrin, Proctors for Libelants.

Copy received this 19th day of June, 1939.

J. Charles Dennis, United States District Attorney; Gerald Shucklin, Assistant U. S. District Attorney, Proctors for Wm. A. Marshall, Deputy Commissioner; Oscar A. Zabel, Proctor for respondent, John T. Clark.

[File endorsement omitted.]

[fols. 122-129] Bond on Appeal for $1,000.00 approved, and filed June 24, 1939, omitted in printing.

[fol. 130] IN UNITED STATES DISTRICT COURT

No. 47

No. 48

In Admiralty

(Consolidated Causes)

[Title omitted]

PRAECIPE FOR TRANSCRIPT ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 26, 1939

To the Clerk of the Above Entitled Court:

You will please prepare the record on appeal to the Supreme Court of the United States in the above entitled and numbered consolidated causes, to consist of all necessary papers and certificates, including the following:

1. Bill of Complaint in Cause No. 47.

2. Summons in cause No. 47 with attached return of service.

[fol. 131] 3. Bill of Complaint in Cause No. 48 (omitting transcripts of testimony taken at hearings before respondent Wm. A. Marshall, August 25, 1931, November 22, 1938, and June 5, 1939, and exhibits thereto attached).

4. Summons in Cause No. 48 with attached return of service.

5. Motion for temporary restraining order in Cause No. 47.

6. Notice of hearing motion for temporary restraining order in Cause No. 47.

7. Motion for temporary restraining order in Cause No. 48.

8. Notice of hearing motion for temporary restraining order in Cause No. 48.

9. Motion of respondent John T. Clark to dismiss Bill of Complaint in Cause No. 47.

10. Motion of respondent John T. Clark to dismiss Bill of Complaint in Cause No. 48.

11. Temporary restraining order in Cause No. 47.

12. Temporary restraining order in Cause No. 48.

13. Bond on temporary restraining order in Causes No. 47 and No. 48.

14. Clerk's minute entry of March 28, 1939, fixing date of hearing by three-judge court and five-day notice in Causes No. 47 and 48.

15. Order of March 29, 1939, convoking three-judge court and five-day notice to Attorney General and respondents, and Clerk's certificate of mailing thereto attached, in Cause No. 47.

16. Order of March 29, 1939, convoking three-judge court and five-day notice to Attorney General and respondents, [fol. 132] and Clerk's certificate of mailing thereto attached, in Cause No. 48.

17. Motion of respondent John T. Clark for judgment on the pleadings in Cause No. 47.

18. Motion of respondent John T. Clark for judgment on the pleadings in Cause No. 48.

19. Clerk's minute entry of April 24, 1939, in causes No. 47 and No. 48, relating to hearings by three-judge court, and transferring causes to admiralty side of court, and order consolidating same.

20. Memorandum decision of the Honorable Edward E. Cushman and John C. Bowen, United States District Judges, sustaining exceptions in consolidated causes No. 47 and No. 48, filed May 10, 1939.

21. Memorandum decision of the Honorable William Healy, United States Circuit Judge, dissenting, in consolidated causes No. 47 and No. 48, filed May 10, 1939.

22. Final decree, sustaining exceptions, denying injunctive relief and dismissing the libels in consolidated causes No. 47 and No. 48, filed June 9, 1939.

23. Petition for appeal to the Supreme Court of the United States, and order thereon.

24. Notice of appeal to the Supreme Court of the United States.

25. Assignment of errors.

26. Jurisdictional statement required by Supreme Court Rule 12, Paragraph 1.

27. Citation on appeal.

28. Cost bond on appeal.

29. Statement directing attention to Supreme Court Rule 12, Paragraph 3.

[fol. 133] 30. Acknowledgment of service of petition for appeal and order thereon, assignment of errors, jurisdictional statement, and statement directing attention to Supreme Court Rule 12, Paragraph 3.

31. This praecipe.
32. Clerk's certificate.

You are requested to transmit such record to the Clerk of the Supreme Court of the United States in the manner provided by law and applicable rules of court.

Bogle, Bogle & Gates, Stanley B. Long, Edward G. Dobrin, Proctors for Libelants and Appellants herein. J. Charles Dennis, U. S. District Attorney; Gerald Shucklin, Assistant U. S. District Attorney, Proctors for Wm. A. Marshall, Deputy Commissioner, Respondent and Appellee herein. Oscar A. Zabel, Proctor for John T. Clark, Respondent and Appellee herein.

[File endorsement omitted.]

[fols. 134-135] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 136-138] Citation, in usual form, showing service on J. Chas. Dennis et al. filed June 24, 1939, omitted in printing.

[fol. 139] SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS AND DESIGNATION OF RECORD REQUIRED BY SUPREME COURT RULE 13, PARAGRAPH 9—Filed August 7, 1939

Come now the appellants in the above entitled consolidated causes, and in pursuance to Supreme Court Rule 13, Paragraph 9, respectfully show as follows:

I

The points to be relied upon by appellants on appeal of the above entitled and numbered causes in this court are as [fol. 140] follows:

1. That the United States District Court for the Western District of Washington, Northern Division, erred in grant

ing, and not denying and overruling the exceptions of the respondent, John T. Clark to said libels herein, and each of them, in that it appears from said libels, and each of them, that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which respondent Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, purported to have obtained authority to and did review the compensation order and award of compensation *of compensation* of August 26, 1931, and pursuant to which said respondent purported to have obtained authority to and did issue and file a supplemental compensation order and award of compensation on the 13th day of March, 1939, is unconstitutional and void, being in violation of the Fifth and Fourteenth amendments to the Constitution of the United States, in granting to the respondent John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and imposes burdens upon appellants as employers and insurance carrier under said Act not imposed upon others similarly situated, and deprives libelants (appellants herein) of their property without due process of law;

2. That the United States District Court for the Western District of Washington, Northern Division, erred in denying and not granting the applications of the libelants (appellants herein) and each of them, for an interlocutory or [fol. 141] permanent injunction in the above entitled and numbered consolidated causes, in that it appears from said libels, and each of them, that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the respondent Wm. A. Marshall, as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931, and pursuant to which said respondent purported to have obtained authority to and did issue and file a supplemental compensation

order and award of compensation on the 13th day of March, 1939, is unconstitutional and void, being in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in granting to respondent John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and imposes burdens upon appellants as employer and insurance carrier under said Act not imposed upon others similarly situated, and deprives libelants (appellants herein) of their property without due process of law;

3. That the United States District Court for the Western District of Washington, Northern Division, erred in dismissing the above entitled and numbered consolidated causes, and the libels therein, and each of them, in that it appears from said libels, and each of them, that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which respondent Wm. A. Marshall, Deputy Commissioner, under the Longshoremen's [fol. 142] and Harbor Workers' Compensation Act, purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931, and pursuant to which said respondent purported to have obtained authority to and did issue and file a supplemental compensation order and award of compensation on the 13th day of March, 1939, is unconstitutional and void, being in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in granting to respondent John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and imposes burdens upon appellants as employer and insurance carrier under said Act not imposed upon others similarly situated and deprives libelants (appellants herein) of their property without due process of law.

II.

That to enable this court to consider the foregoing points upon which appellants will rely on this appeal, a complete

record on appeal filed with the Clerk of this court will be necessary.

Dated this 1st day of August, 1939.

Bogle, Bogle & Gates, Stanley B. Long, Edward G. Dobrin, Proctors for Appellants.

Service of the foregoing by receipt of true copy thereof is hereby acknowledged this 2d day of August, 1939.

J. Chas. Dennis, United States District Attorney; Gerald Shucklin, Assistant U. S. District Attorney, Proctors for Wm. A. Marshall, Deputy Commissioner. Oscar A. Zabel, Proctor for Respondent, John T. Clark.

[fol. 143] [File endorsement omitted]

Endorsed on cover: Edward G. Dobrin. File No. 43,678. W. Washington, D. C. U. S., Term No. 271. Paramino Lumber Company and Union Insurance Society of Canton, Ltd., Appellants, vs. Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and John T. Clark. Filed August 7, 1939. Term No. 271 O. T. 1939.

FILE COPY

Supreme Court, U. S.
FILED
AUG 7 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 271

PARAMINO LUMBER COMPANY AND UNION INSURANCE SOCIETY OF CANTON, LTD.,

Appellants,

vs.

WM. A. MARSHALL, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND JOHN T. CLARK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

STANLEY B. LONG,
EDWARD G. DOBRIN,
Counsel for Appellants,

BOGLE, BOGLE & GATES,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 271

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

IN ADMIRALTY.

(Consolidated Causes.)

No. 47

PARAMINO LUMBER COMPANY, A CORPORATION, AND UNION INSURANCE SOCIETY OF CANTON, LTD., A CORPORATION,

Libelants,

vs.

WM. A. MARSHALL, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND JOHN T. CLARK,

Respondents.

No. 48

PARAMINO LUMBER COMPANY, A CORPORATION, AND UNION INSURANCE SOCIETY OF CANTON, LTD., A CORPORATION,

Libelants,

vs.

WM. A. MARSHALL, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND JOHN T. CLARK,

Respondents.

JURISDICTIONAL STATEMENT REQUIRED BY SUPREME COURT RULE 12, PARAGRAPH 1.

Come now Paramino Lumber Company, a corporation, and Union Insurance Society of Canton, Ltd., a corporation,

libelants in the above entitled and numbered consolidated causes and appellants herein, and pursuant to Supreme Court Rule 12, Paragraph 1, and present and file this their jurisdictional statement showing the basis upon which said libelants, appellants herein, contend that the Supreme Court of the United States has appellate jurisdiction to review on appeal the final decree appealed from herein, as follows:

I.

The statute believed to sustain the jurisdiction of the Supreme Court of the United States is the Judicial Code, Section 266, as amended by the Act of August 24, 1937, Chapter 754, Section 3, 50 Stat. 752, Title 28 U. S. C. 380a.

II.

The validity of Private Act No. 445 of the 74th Congress, entitled "An Act for the Relief of John T. Clark of Seattle, Washington", approved April 10, 1936, 49 Stat. 2244, is involved and is hereinafter set out verbatim as follows:

"AN ACT

For the relief of John T. Clark, of Seattle, Washington

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such

compensation, the provisions of Sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, That such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936." (49 Stat. 2244.)

III.

The date of the decree to be reviewed is June 9, 1939 (date filed in the Office of the Clerk of the United States District Court, Western District of Washington, Northern Division, decree having been signed by United States District Judges Edward E. Cushman and John C. Bowen on June 5, 1939, and by United States Circuit Judge William Healy, dissenting, on June 7, 1939).

IV.

The date upon which the application for appeal was presented is June 19th, 1939.

V.

The following is a statement of the nature of the above entitled and numbered consolidated causes and of the rulings of the United States District Court for the Western District of Washington, Northern Division, convoked pursuant to Judicial Code Section 266, as amended by the Act of August 24, 1937, Chapter 754, Section 3, 50 Stat. 752, Title 28 U. S. C. 380a, bringing the said consolidated causes within the jurisdictional provisions above referred to and relied on:

In these consolidated causes libelants, employer and insurance carrier, respectively, under the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. Sec. 901, et seq.), hereinafter referred to as the Act, seek interlocutory and permanent injunctions suspending and

restraining the enforcement, operation, or execution of, or setting aside that certain Private Act of Congress No. 445, entitled "An Act for the Relief of John T. Clark of Seattle, Washington", approved April 10, 1936 (49 Stat. 2244), set forth verbatim in Paragraph II above, upon the ground that such Private Act and the whole thereof is repugnant to the Constitution of the United States and more particularly the Fifth and Fourteenth Amendments thereto.

Cause No. 47 was timely instituted in this court as an independent suit in equity seeking temporary, interlocutory and permanent injunctive relief against said Private Act No. 445 of the 74th Congress, and against a supplemental order and award of compensation of more than $4,000.00, made to respondent John T. Clark, a longshoreman, pursuant to and under the authority of said Private Act. Cause No. 48 was timely instituted as a suit in equity for review by this court (in the manner prescribed by the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A., Sec. 921(b), for review of compensation orders made thereunder), of said supplemental order and award of compensation made by the respondent Wm. A. Marshall as Deputy Commissioner, to the respondent John T. Clark under authority of said Private Act.

Upon application to the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, for the injunctive relief herein sought against said Private Act of Congress and the supplemental compensation order issued and filed by respondent Wm. A. Marshall as Deputy Commissioner pursuant thereto, and temporary restraining orders having been granted and entered in each of said causes in the manner provided by law, and a bond thereon in the amount of $5,000.00 having been duly approved and filed, a specially constituted three-

judge court was convoked pursuant to Judicial Code Section 266, as amended by Act of August 24, 1937, Chapter 754, Sec. 3, 50 Stat. 752, Title 28 U. S. C. A. 380a, for the hearing of the exceptions of the respondent John T. Clark to the sufficiency of the libels herein and of the applications of libelants for interlocutory and permanent injunctions, said three-judge court so convened, consisting of the Honorable William Healy, United States Circuit Judge of the Circuit Court of Appeals for the Ninth Circuit, Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division, and the Honorable John C. Bowen, United States District Judge for the Western District of Washington, Northern Division.

After due notice of more than five days given to the Attorney General of the United States and to the respondents in said causes in the manner provided by law (identical orders of Honorable John C. Bowen, United States District Judge for the Western District of Washington, Northern Division, entered in each of these causes before consolidation March 29, 1939, copy of which is appended hereto), these consolidated causes came on for hearing before said three-judge court, sitting in admiralty, on the 24th day of April, 1939, libelants and respondents being represented by their proctors of record, said causes having by stipulation of the parties and order of said three-judge court been transferred to the admiralty side of said court and consolidated for all purposes, including hearing and appeal, and written briefs having been submitted and oral argument having been concluded, said consolidated causes were taken under advisement for determination and decision upon the exceptions of the respondent John T. Clark to the sufficiency of the libels herein upon libelants' applications for interlocutory or permanent injunctive relief as prayed for therein.

On the 10th day of May, 1939, the Honorable Edward E. Cushman and John C. Bowen, United States District Judges, as a majority of said three-judge court, filed their written memorandum decision in said consolidated causes, holding that since the invalidity of the Private Act of Congress above referred to was not so free from doubt as to overcome the presumption of its validity, the Private Act must be upheld by this court, and further holding that by reason thereof the exceptions of the respondent John T. Clark to the libels must be sustained and injunctive relief denied. On said date the Honorable William Healy, United States Circuit Judge, filed his written dissenting decision in said consolidated causes, holding that said Private Act was invalid and unconstitutional for the reasons therein set forth and that the restraining orders heretofore entered and granted should be made permanent. There is appended hereto copies of both the majority and dissenting opinions referred to.

The final decree in these consolidated causes sustaining the exceptions of the respondent John T. Clark to the libels herein, denying the applications of the libelants for interlocutory or permanent injunctions and dismissing said libels with prejudice and with costs in favor of the respondents, was signed by the Honorable Edward E. Cushman and John C. Bowen, United States District Judges, on the 5th day of June, 1939, and by the Honorable William Healy, United States Circuit Judge, dissenting, on the 7th day of June, 1939, and having been duly excepted to by libelants, was filed in the Office of the Clerk of this Court on the 9th day of June, 1939.

VI.

In addition to the specific statute referred to in paragraph I hereof, the decision of the Supreme Court of the

United States in the following case is believed to sustain the jurisdiction of that court:

International Ladies Garment Workers Union v. *Donnelly Garment Co.* (1938), 304 U. S. 243, 58 S. Ct. 875, 82 L. Ed. 1316.

Dated at Seattle, Washington, this 19th day of June, 1939.

Respectfully submitted,

BOGLE, BOGLE & GATES,
STANLEY B. LONG,
EDWARD G. DOBRIN,
Proctors for Libelants and Appellants herein.

EXHIBIT "A".

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 48.

PARAMINO LUMBER COMPANY, a Corporation, and UNION INSURANCE SOCIETY OF CANTON, LTD., a Corporation, Complainants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Worker's Compensation Act, and John T. Clark, Defendants.

Order.

Plaintiffs employer and insurance carrier complaining that after the defendant Clark, a longshoreman, was injured upon one of the employer's vessels in Seattle harbor waters and was under date of August 26, 1931, granted a compensation order and award under the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A.; Secs. 901, et seq.) and that no proceedings were had to review, suspend or set aside that award in whole or in part, the Senate and House of Representatives of the United States of America passed Private Act No. 445 of the 74th Congress (H. R. 4439), approved April 10, 1936, for the relief of said John T. Clark and that pursuant to said Private Act defendant Marshall, Deputy Commissioner under said Longshoremen's and Harbor Workers' Compensation Act, under date of March 13, 1939, did make and enter a further compensation order and award of compensation in favor of said Clark, and further that the action of said Deputy Commissioner in so making said award of March 13, 1939, was wholly arbitrary and capricious and against the credible testimony adduced at the hearing and was in all respects illegal;

And plaintiffs further alleging that said Private Act of Congress and said award of March 13, 1939, made pursuant

thereto are under the Fifth and Fourteenth Amendments illegal, unconstitutional and void, seek a review of such acts of the Deputy Commissioner and a hearing upon all of the allegations of plaintiffs' complaint before a 3-judge court pursuant to the provisions of 28 U. S. C. A., Sec. 380(a), and seek a determination by such court that, as alleged by plaintiffs, said Private Act of Congress and said award of the Deputy Commissioner of March 13, 1939, made thereunder are illegal, unconstitutional and void and of no effect and seek temporary restrainer and interlocutory and permanent injunctive relief against said Private Act of Congress and said award;

And such application for such interlocutory and permanent injunctive relief and for such 3-judge court having been presented to the undersigned judge, and the said undersigned judge having immediately thereupon requested the Senior Circuit Judge of the Ninth Circuit to designate two other judges to participate with the undersigned judge as a 3-judge court in hearing and determining such application; and thereupon said Senior Circuit Judge having immediately so designated two other judges for such purpose, to-wit: Honorable William Healy, United States Circuit Judge for the Ninth Circuit, and Honorable Edward E. Cushman, United States District Judge for the Western District of Washington in said Circuit, and by the provisions of said 28 U. S. C. A., Sec. 380(a), it being the duty of said two other judges so designated and of the undersigned judge as such 3-judge court to participate in such hearing and determination; now, therefore,

The undersigned judge does hereby call to his assistance said the Honorable William Healy and said the Honorable Edward E. Cushman to act with the undersigned judge as a 3-judge court pursuant to the requirements of 28 U. S. C. A., Sec. 380(a), and to hear and determine such applications and to hear and determine any and all other matters which may properly come before the court during the progress of the above entitled cause; and

By and with the advice and consent of the members of the court and upon stipulation of counsel for all interests appearing, the date and place of convening of said 3-judge

court for the purpose of hearing the application for interlocutory injunction and such other matters as may properly come before the court are hereby fixed on April 24, 1939, at the hour of 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, in the north court room of this court in the Post Office Building at Seattle, Washington, provided that the time and place of hearing such application may by order be changed should convenience require it; and

The undersigned judge being now advised by oral stipulation of counsel made in open court that the application for said interlocutory injunction will be submitted at said hearing upon the pleadings, motions, admissions and briefs already filed, made and appearing of record, and upon the arguments of counsel, without further or additional proof, it is further ordered that the Clerk forthwith mail to Judges Healy and Cushman each a copy of all of such pleadings, motions, briefs, and records and a copy of this order, and a copy of temporary restraining order, and that the attorneys of record for plaintiffs are hereby directed to forthwith furnish to the Clerk sufficient copies to enable the Clerk to comply with the foregoing order as to mailing.

It is further hereby ordered that the Clerk forthwith give notice of said hearing on April 24, 1939, and of the entry of this order to the Attorney General of the United States, Department of Justice, Washington, D. C., by forthwith mailing by registered mail to said Attorney General a certified copy of this order, and the attorneys of record for the plaintiffs are hereby ordered to pay to the Clerk the cost of such certified copy and of such registered mailing. Counsel for all parties appearing having heretofore in open court stipulated that all parties do now have actual notice of said hearing on April 24, 1939, the Clerk is hereby directed to forthwith mail a copy of this order to each of the following:

1. Bogle, Bogle & Gates and Stanley B. Long, Attorneys for Plaintiffs, Seattle, Washington.

2. Oscar A. Zabel, Attorney for Defendant-Claimant John T. Clark, Seattle, Washington.

3. Honorable J. Charles Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney, Attorneys for Defendant William A. Marshall, Seattle, Washington.

Done in open court this 29th day of March, 1939.

(Sd.) John C. Bowen, United States District Judge.

EXHIBIT "B".

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In Admiralty. Nos. 47 and 48.

PARAMINO LUMBER COMPANY, a corporation, and UNION INSURANCE SOCIETY OF CANTON, LTD., a corporation, *Libelants,*

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and JOHN T. CLARK, *Respondents.*

Memorandum Decision.

Filed May 10, 1939

Bogle, Bogle & Gates and Stanley Long, Seattle, Washington, Attorneys for Libelants.

J. Charles Dennis, United States Attorney, Seattle, Wash., Gerald Shucklin, Asst. United States Attorney, Seattle, Wash., attorneys for Respondent Marshall.

Oscar A. Zabel, Seattle, Washington, Attorney for Respondent Clark.

Before Healy, Circuit Judge, and Cushman and Bowen, District Judges.

Some of the historical background of these cases may be found in the decisions of the District Court, 18 F. Supp.

645, and of the Ninth Circuit Court of Appeals, 95 F. (2d) 203.

These are two consolidated suits in admiralty before this 3-judge court, convoked pursuant to 28 U. S. C. A., Sec. 280a, brought by libelants employer and insurance carrier against respondents Deputy Commissioner and John T. Clark for temporary, interlocutory and permanent injunctive relief against Private Act No. 445 of the 74th Congress (H. R. 4439) for the relief of John T. Clark, and against a supplemental order and award of compensation of more than $4000 made under that Private Act to Clark, a longshoreman, upon the alleged ground that the Private Act and award are illegal, unconstitutional and void, and that they (as libelants allege) deny to libelants the equal protection of the laws and deprive them of their property without due process of law contrary to the Fifth and Fourteenth Amendments.

Cause No. 47 was commenced as an independent equity suit and Cause No. 48 was commenced as a suit for review by the District Court of the Deputy Commissioners' supplemental award. The causes have been consolidated and transferred to the admiralty side of the court. Both seek the same injunctive relief above noted. Respondents except to the libels on the ground that the libels do not state sufficient facts for the relief demanded. The sole question for decision is whether the Private Act is constitutional and a valid amendment to the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A., Secs. 901, et seq.) Respondents contend that it is valid because it affects only the remedy and not the right of John T. Clark. Libelants insist that the Private Act is unconstitutional and void because the rights of the parties had been fixed by a previous binding award of compensation which cannot be changed by the effect of the Private Act giving as it does private relief only to Clark and to no one else similarly situated.

The questioned Private Act of Congress provides as follows:

"AN ACT

For the relief of John T. Clark, of Seattle, Washington.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, That such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936."

BOWEN, *District Judge:*

Much of what is stated in the following quotations was said with reference to state statutes, but the principles stated apply equally to Acts of Congress.

"A presumption in favor of constitutionality is raised by the mere fact of the enactment of a statute by the legislature; and the burden of showing that it is unconstitutional is on the party asserting it. * * *." 12 C. J. 791-794. "As to the degree and extent of this presumption, the rule, as variously stated, is that every reasonable presumption will be made in favor of the validity of a statute; * * * and also that doubt, a fair doubt, any, and all, doubts, and every reasonable doubt as to the constitutionality of a statute will be resolved in favor of its validity; * * *." 12 C. J. 794-795. "* * * Other statements are that, where doubt exists whether there is a con-

flict between the statute and the constitution, the statute must prevail, and that the statute must be upheld unless its invalidity appears beyond all doubt, * * *." 12 C. J. 798.

In Williams *v.* Norris, 25 U. S. 72 (12 Wheat. 117), one question was which one of two persons had the paramount title in certain lands. Norris claimed that his title was perfected by proceedings under a statute of the state of Tennessee entitled "an act for the relief of Ezekiel Norris", which provided: "Be it enacted," etc., "that the commissioner of West Tennessee be, and he is hereby authorized to issue to Ezekiel Norris, certificates or warrants to the amount of 2,280 acres, being the amount of two entries, No. 2,046 for 1,000 acres, and No. 2,047 for 1,280 acres, on which no warrants or grants were issued; provided, that the said Ezekiel Norris shall produce sufficient evidence to the said commissioner that the consideration for said entries was paid, and that no warrant or grant ever issued on said entries."

Williams contended that statute was unconstitutional, but the court overruled that contention and at pages 80-81 (12 Wheat. 127-128) by Marshall, C. J., said: "What difference is there, so far as respects its constitutionality, between the act passed in his (Norris') particular case, and the act containing a general reference of all cases of the same description to the commissioner? * * * There are, undoubtedly, great and solid objections to legislation for particular cases. But these objections do not necessarily make such legislation repugnant to the constitution of the United States."

That old case of Williams *v.* Norris, *supra*, decided in 1827, may be somewhat involved on the facts, but it is clear that in that case Chief Justice Marshall overruled the constitutional objection to a private act of a state legislature for the perfection of one man's title to land against the adverse claims of another man, and held in effect that the fact that legislation is for the private relief of one man in his relationship with another does "not necessarily make such legislation repugnant to the constitution of the United States". Counsel have not cited and the writer of this opinion is not advised of any later Supreme Court case

overruling that judgment of Marshall. That situation, until unmistakably cleared up by later Supreme Court decision, renders this three-judge District Court unable to rule without doubt that the Private Act of Congress for the relief of John T. Clark here assailed is unconstitutional. Since its invalidity is not so free from doubt as to overcome the presumption of its validity, the Private Act must be upheld by this court.

The exceptions to the libels will be sustained. An order or orders carrying the foregoing ruling into effect may be settled upon notice or stipulation.

——— ———,
Circuit Judge.
EDWARD E. CUSHMAN,
District Judge.
JOHN C. BOWEN,
District Judge.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

IN ADMIRALTY. NOS. 47 and 48.

PARAMINO LUMBER COMPANY, *et al.*,

vs.

WM. A. MARSHALL, Deputy Commissioner, *et al.*

HEALY, Circuit Judge, dissenting.

I regret my inability to agree with my associates, but the invalidity of the private act does not seem to me doubtful.

The beneficiary of the act, Clark, was injured in January, 1931 while in the employ of the libellant Paramino Lumber Company. A claim for compensation was filed by Clark. Upon hearing before the deputy commissioner in August, 1931, an award of compensation was made in which it was determined that the claimant had been wholly disabled from the time of the injury to July 5, 1931, but had recovered from his injury and disability on the latter date. The employer and the insurance carrier paid compensation for the

period of disability, pursuant to the order. Under the terms of the Longshoremen's Act (Sec. 21 (a); 33 U. S. C. A. Sec. 921 (a)) the compensation order became final at the expiration of thirty days thereafter, there having been no proceeding to suspend or set it aside.

So far as material here, Sec. 22 of the Longshoremen's Act, in effect then as now, provides that upon his own initiative, or upon the application of any party in interest, on the ground of a change in condition or because of mistake in a determination of fact, the deputy commissioner may review a compensation case, at any time prior to one year after the date of the last payment of compensation, and may issue a new compensation order continuing, reinstating, or increasing compensation. No review was had of the case as permitted by this provision. On April 10, 1936 Congress passed the private act in question. The original order confessedly involved no fraud, and it is conceded that the award now sought to be enjoined was made solely under authority of the special act.

There are doubtless many instances in which injured longshoremen have found themselves in the unfortunate plight of Mr. Clark. Compare, for example, the facts in Kobilkin *v.* Pillsbury, 9 Cir., — F. (2d) —. I cannot but believe that the private act, singling out as it does the libellants for the imposition of a burden not imposed by Congress on others in like situation, impinges on their constitutional rights guaranteed by the due process clause of the Fifth Amendment. The arbitrary nature of the act is unrelieved by any asserted distinction which might serve to differentiate the obligation of these parties from that of other employers or insurance carriers in like circumstances. What congress has done is to authorize an award of money for the relief of a private individual, payable not out of the public treasury, but out of the pockets of other private parties guilty of no fault. The statute involved in Williams *v.* Norris, 25 U. S. 72, appears to have been purely remedial, and I see nothing in that decision which would support this legislation.

I think the statute is invalid on grounds apart from the frailties just discussed. It purports to extend or remove the time limits imposed by Secs. 21 and 22 of the Longshore-

men's Act, and is applicable only in a case where these time limits had already expired. In Danzer & Co. *v.* Gulf & Ship Island Railroad Co., 268 U. S. 633, the court dealt with a parallel situation. It was there pointed out that the Interstate Commerce Act created a cause of action against the carrier (in that case the right to damages for misrouting) and at the same time operated as a limitation upon liability. It was held that in the case of such statutory causes of action the lapse of the time limit not only bars the remedy but destroys the liability; and to give the statute a retroactive effect would be to deprive the carrier of its property without due process of law in contravention of the Fifth Amendment.

Similarly, the Longshoremen's Act (Sec. 4) creates a cause of action for compensation, irrespective of fault. It also limits the time within which an award of additional compensation may be made by the deputy commissioner. This period had expired prior to the enactment of the private act here in question. As of the latter date liability no longer existed. Thus the act not only supplies a remedy but necessarily imports the creation of a new liability.

It would seem that the principle of the Danzer case is equally applicable to general and to private statutes, however free from other infirmities the latter may be.

I think the restraining order heretofore granted should be made permanent.

WILLIAM HEALY,
U. S. Circuit Judge.

Jurisdictional statement with attached copies endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Jun. 24, 1939. Elmer Dover, Clerk, by S. Cook, Deputy.

Office, Supreme Court, U. S.
DEC 11
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939

No. 271

PARAMINO LUMBER COMPANY and UNION INSURANCE SOCIETY OF CANTON, LTD.,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and JOHN T. CLARK.

IN ADMIRALTY
(Consolidated Causes)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLANTS

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FARWEST LITHOGRAPH & PRINTING CO., SEATTLE

Supreme Court of the United States

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No. 271

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 271

PARAMINO LUMBER COMPANY and UNION INSURANCE SOCIETY OF CANTON, LTD.,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and JOHN T. CLARK.

IN ADMIRALTY
(Consolidated Causes)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLANTS

I
OPINION OF THE COURT BELOW

The opinion of the United States District Court for the Western District of Washington, Northern Division, convoked as a three-judge court pursuant to Judicial Code §266, as amended by Act of August 24, 1937,

chapter 754, section 3, 50 Stat. 752, Title 28 U. S. C. A. §380a, is reported as "*Paramino Lumber Company, et al. v. Marshall, Deputy Commissioner, et al. Nos. 47 and 48*" in 27 F. Supp. 823 (1939 Advance Opinions), and is set out in full in the Appendix hereof (App. 1).[1]

II
JURISDICTION

(a) The jurisdiction of this court is invoked under section 266 of the Judicial Code, as amended by the Act of August 24, 1937, chapter 754, section 3, 50 Stat. 752, Title 28 U. S. C. A., §380a, and Rule 47 of the Revised Rules of the Supreme Court of the United States, effective February 27, 1939.

(b) In these consolidated causes appellants seek interlocutory and permanent injunctions suspending and restraining the enforcement, operation or execution of, or setting aside that certain Private Act of Congress No. 445, entitled "An Act for the Relief of John T. Clark of Seattle, Washington," approved April 10, 1936 (49 Stat. 2244), the validity of which is here involved, upon the ground that such Private Act and the whole thereof is repugnant to the Constitution of the United States and more particularly the Fifth Amendment thereto. Said Private Act is hereinafter set out *verbatim*, as follows:

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[1]The historical background of these cases may be found under the same title in the decisions of the U. S. District Court, Western District of Washington, 18 F. Supp. 645, and of the U. S. Circuit Court of Appeals for the 9th Circuit, 95 F. (2d) 203. Certiorari denied by this court without opinion October 10, 1938. This action was dismissed upon the ground that the suit was premature, no compensation order or award having at that time been issued pursuant to said Private Act of Congress No. 445.

"An Act—For the Relief of John T. Clark, of Seattle, Washington.

"*Be it enacted by the Senate and House of Representaties of the United States of America in Congress assembled*, That in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commssion be, and it is hereby authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of Sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, That such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936." (49 Stat. 2244).

(c) The date of the decree to be reviewed is June 9, 1939 (R. 58).

(d) The date upon which the application for appeal was presented is June 19, 1939 (R. 61).

(e) The date upon which these consolidated causes were docketed in this Court is August 7, 1939 (R. 71).

(f) Separate bills of complaint in causes Nos. 47 and 48 (thereafter consolidated and transferred to the admiralty side of the court (R. 52, 58)) were filed in the United States District Court for the Western District of Washington, Northern Division, on March 16, 1939 (R. 1, 21). Temporary restraining orders were entered and filed on March 23, 1939 (R. 38, 40), together with

bond thereon in the amount of $5,000 (R. 43). Motions of the appellee, John T. Clark, to dismiss appellants' bills of complaint in each cause upon the ground that said bills of complaint do not state sufficient facts to constitute a cause of action and for the relief prayed for were filed March 23, 1939 (R. 37). Orders in each cause, convening a three-judge court pursuant to Title 28 U. S. C. A., §380a and setting both causes for hearing and providing for notice thereof to the Attorney General of the United States, were entered and filed by the Honorable John C. Bowen, United States District Judge, on March 29, 1939 (R. 44, 47). Both causes were heard by said three-judge court, consisting of the Honorable John C. Bowen and Edward E. Cushman, District Judges, and the Honorable William Healy, Circuit Judge, on April 24, 1939, and on said date both causes were consolidated for hearing and for all purposes, including appeal, and transferred to the admiralty side of the court (R. 52, 58).[2]

On May 10, 1939, the Honorable Edward E. Cushman and John C. Bowen, District Judges, as a majority of said three-judge court, filed their written opinion in these consolidated causes, and on the same date the Honorable William Healy, United States Circuit Judge, filed his dissenting opinion herein (R. 52, 56), (App. 5). The final decree to be here reviewed, sustaining exceptions to said libels, denying injunctive relief, and dismissing said

[2]In accordance with the practice established by the Circuit Court of Appeals for the Ninth Circuit and approved in Fireman's Fund, etc. v. Otto Hugo and Marshall, 103 F. (2d) 513, 517 (1939), and Kobilkin v. Pillsbury, Deputy Commissioner, 103 F. (2d) 667 (1939).

libels was filed June 9, 1939 (R. 58). Notice of Appeal (R. 67), Petition for Appeal (R. 61), together with Assignment of Errors (R. 63), Jurisdictional Statement pursuant to Supreme Court Rule 12, Par. 1, Citation on Appeal (R. 68), Cost Bond on Appeal (R. 65), Statement Directing Attention to Supreme Court Rule 12, Par. 1, Praecipe for Transcript on Appeal (R. 66), Acknowledgment of Service pursuant to Supreme Court Rule 12, Par. 3 were served on all parties, other than appellants, on June 23, 1939, and filed on June 26, 1939. Appellants' Statement of Points and Designation of Record pursuant to Supreme Court Rule 13, Par. 9 (R. 68) was served on August 2, 1939, and filed in this Court on August 7, 1939. Appellants' Transcript of Record on Appeal was filed in this Court on August 7, 1939.

III
STATEMENT OF THE CASE

In these consolidated suits in admiralty appellants, employer and insurance carrier respectively, under the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. A., §901, et seq.), seek temporary, interlocutory and permanent injunctive relief against that certain Private Act No. 445 of the 74th Congress (H. R. 4439) "* * * for the relief of John T. Clark (appellee) of Seattle, Washington," approved April 10, 1936 (49 Stat. 2244) and against a compensation order and award of compensation made solely under the purported authority of said Private Act by Wm. A. Marshall, Deputy Commissioner, (appellee) in favor of said John T. Clark, a longshoreman, upon the ground that said Private Act is unconstitutional and said award made

thereunder void and of no force and effect, since Private Act No. 445 is in violation of the Fifth Amendment to the Constitution of the United States in that it denies to appellants the equal protection of the laws enjoyed by others similarly situated, and grants to appellee John T. Clark special privileges not accorded equally to other employees under the Longshoremen's and Harbor Workers' Act, and deprives appellants of their property without due process of law.

Cause No. 47 was instituted as an independent suit in equity, the bill of complaint therein containing the jurisdictional allegations necessary to confer jurisdiction upon the District Court as a federal court, to-wit: diversity of citizenship and jurisdictional amount in controversy exceeding the sum or value of $3,000, exclusive of interest and costs (R. 2). Cause No. 48 was timely instituted as a suit in equity seeking to review said compensation order and award of compensation (R. 26, 17), pursuant to the procedure prescribed in the Longshoremen's and Harbor Workers' Act for review of compensation orders made thereunder (Title 33 U. S. C. A., §921) (R. 21).

Both causes seeking the same injunctive relief were consolidated and transferred to the admiralty side of the District Court for hearing and all purposes, including appeal (R. 51, 58). Appellee John T. Clark excepted to the libels in both causes upon the ground that the same do not state sufficient facts for the relief prayed for (R. 37, 51).

This is a direct appeal to this court, taken from a final decree sustaining said exceptions, denying injunctive relief and dismissing said libels, as authorized by Judicial

Code Sec. 266, as amended by Act of August 24, 1937, chapter 754, section 3, 50 Stat. 752, Title 28 U. S. C. A., §380a.

The factual background, which more fully appears from the allegations of the libels herein (R. 1, 21), may be summarized as follows:

On January 17, 1931, appellee John T. Clark was in the employ of appellant Paramino Lumber Company (whose insurance carrier under the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. A., §901, et seq.) was the Union Insurance Society of Canton, Ltd.), and while engaged as a longshoreman on board the SS. DOROTHY WINTERMOTE, then lying in the navigable waters in the harbor of the City of Seattle, State of Washington, sustained personal injuries in the course of such employment, causing temporary disability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Compensation was voluntarily paid to said John T. Clark by appellants, without a compensation order, and thereafter, upon application of said appellee, John T. Clark, a hearing on his claim was held on the 25th day of August, 1931, by appellee Wm. A. Marshall as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act. Testimony having been taken, the hearing resulted in the filing of a compensation order and award of compensation by said Deputy Commissioner on the 26th day of August, 1931, wherein it was found that the said John T. Clark was wholly disabled from January 17, 1931, to and including July 4, 1931, as a result of the injuries sustained, and further finding that said

John T. Clark had recovered from the said injury and disability occasioned thereby on July 5, 1931 (R. 13).[3] All compensation required to be paid in accordance with said award had been theretofore paid to said John T. Clark by appellants in accordance with the terms of said order (R. 14), in which a proper credit was allowed (R. 14).

Pursuant to the terms and provisions of the Longshoremen's and Harbor Workers' Compensation Act, the compensation order of August 26, 1931, became final at the expiration of the thirtieth day thereafter. (33 U. S. C. A., §921(a)).[4] No proceedings to review, suspend or set aside said order were brought by the appellee John T. Clark or any party in interest, either within thirty days after the filing of said award[5] or otherwise,[6] and the same became final, as provided by law (R. 3, 4, 23).

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[3]Section 19 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A., §919) provides for the procedure incident to the hearing of claims and the filing of a compensation order by the Deputy Commissioner. The compensation order and award of August 26, 1931, is set forth in full in Appendix (pp. 8, 9).

[4]Sec. 21a of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A., §921(a)) so far as here relevant provides: "A compensation order shall become effective when filed in the office of the Deputy Commissioner * * * and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, *shall become final at the expiration of the thirtieth day thereafter.*"

[5]Sec. 21(b) of the Longshoremen's and Harbor Workers' Act (Title 33 U. S. C. A., §921(b)), so far as is here relevant provides: "If not in accordance with law, the compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the Deputy Commissioner making the order, and instituted in the Federal District Court for the judicial district in which the injury occurred * * *. The payment of the amounts

Approximately five years later, the 74th Congress of the United States passed a certain private act entitled "An Act—For the Relief of John T. Clark of Seattle, Washington," which act was approved and signed by the President of the United States on the 10th day of April, 1936, and is set forth in full on page 3, supra.

Thereafter, and on June 17, 1936, said Deputy Commissioner, Wm. A. Marshall, upon application of said John T. Clark, and pursuant to said private act, ordered a further hearing to be held on said claim on the 7th day of July, 1936, in his office, 620 Federal Office Building, Seattle, Washington (R. 15).

Following receipt of said Notice of Hearing (R. 15) appellants, contending that appellee Wm. A. Marshall, as Deputy Commissioner, was without jurisdiction or authority to take any further proceedings in connection

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required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing * * * allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. * * *."

[6]Sec. 22 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A., §922), as *amended May* 26, 1934, *subsequent to the making of the compensation order of August* 26, 1931, so far as is here relevant, provides: "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the Deputy Commissioner, the Deputy Commissioner may, at any time prior to one year after the date of the last payment of compensation * * * review a compensation case in accordance with the procedure prescribed in respect of claims under Section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation. * * *." It will be noted that Private Act No. 445 purports to give appellee John T. Clark the right to have the compensation order filed August 26, 1931, reviewed, the provisions of sections 21 and 22 of the Longshoremen's and Harbor Workers' Compensation Act to the contrary notwithstanding.

with said claim, and contending that said private act of Congress was in violation of and repugnant to the Constitution of the United States, and more particularly the Fifth and Fourteenth Amendments thereto, filed their Bill of Complaint in Equity in the District Court of the United States for the Western District of Washington, Northern Division, seeking to enjoin said appellee Wm. A. Marshall, as Deputy Commissioner, from holding said hearing or taking any further action in connection with said claim. This action was dismissed and the injunctive relief therein sought denied by the District Court upon the ground that the same was premature and the court was therefore without jurisdiction.[7]

On appeal from the order of the District Court dismissing said cause and denying injunctive relief, the Circuit Court of Appeals for the Ninth Circuit affirmed said order upon jurisdictional grounds, stating in its written opinion reported in 95 F. (2d) 203:

> "The power of the court to grant injunctive relief, where irreparable damage would otherwise result to an employer, is to be exerted after the hearing and the making of a compensation order, not before. Until such time, by necessary implication, Congress has withheld from the court the power to act. * * * It is apparent that appellants, by pursuing the administrative and judicial procedure prescribed in the statute itself (Longshoremen's and Harbor Workers' Compensation Act) have an entirely adequate remedy. * * * It would still be inappropriate to rule at this juncture on the abstract question of the constitutionality of the Private Act, since the matter may more intelligently be considered in

[7]Paramino Lumber Company, et al. v. Wm. A. Marshall, et al., 18 F. Supp. 654 (1938).

the light of the concrete facts to which the Act is to be applied, as these are developed in the orderly procedure before the Deputy Commissioner."

Thereafter, an application was made to this Court for a writ of certiorari, which was denied, without opinion, on October 10, 1938.

On November 1, 1938, the appellee Wm. A. Marshall, as Deputy Commissioner, in compliance with and under authority of the provisions of said Private Act of Congress, previously referred to, issued a Notice of Hearing to be held on the 22nd day of November, 1938 (R. 16), on which date said hearing was held and testimony introduced (all over appellants' objections), (R. 8, 26). That said hearing of November 22, 1938, was continued for the taking of further testimony to January 5, 1939, on which date the taking of testimony was concluded (R. 8, 26).

On March 13, 1939, and solely under authority of said Private Act of Congress, the appellee Wm. A. Marshall, as Deputy Commissioner, issued and filed in his office a further compensation order and award of compensation (R. 17) (App.10), in which, among other things, it was found that the appellee John T. Clark was wholly disabled from January 17, 1931, to and including January 5, 1939, for which he was entitled to 415-6/7 weeks' compensation at $11.54 per week, amounting to the sum of $4,798.99, and that the total disability of the appellee John T. Clark continued at the time of the hearing on January 5, 1939, and said order further provided for the payment of compensation to said

John T. Clark by appellants in the sum of $11.54 per week (R. 17, 18).[8]

Following service of said compensation order of March 13, 1939 (R. 17), appellants on March 16, 1939, filed their bills of complaint (libels) in these consolidated actions, seeking the relief against said Private Act and said award made thereunder, previously noted (R. 1, 21).

True copies of the bills of complaint (libels) in both causes were forthwith served upon the appellees Wm. A. Marshall and John T. Clark, together with a motion for a temporary restraining order and preliminary injunction (R. 35, 36), which said motion came on for hearing before the District Court, and temporary restraining orders were granted in both causes (R. 38, 40), and a bond thereon in the amount of $5,000 was approved and filed (R. 43), thus temporarily enjoining the payments required to be made by appellants to the appellee John T. Clark, as provided in said compensation order.

On March 29, 1939, an order was entered in each of said causes, convening a three-judge court, providing

[8] "That the employer, SS. 'Dorothy Wintermore' and/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd., shall pay to the claimant compensation as follows: 415-6/7 weeks' compensation at $11.54 per week covering the period from January 17, 1931, to and including January 5, 1939, and amounting to the sum of $4,798.99, less $200.00 to be deducted therefrom and paid Oscar A. Zabel as his attorney; that the employer shall have credit on this award for $331.20 previously paid to the claimant as compensation; that subsequent to January 5, 1939, the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of $11.54 per week; that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treatment as may be appropriate to the further treatment and cure of his disability." (R. 18). The compensation order and award of March 13, 1939, is set forth in full in Appendix (pp. 10-12).

for notice thereof to the Attorney General of the United States, as required by Act of August 24, 1937, chapter 754, section 3, 50 Stat. 752, Title 28 U. S. C. A., §380a (R. 44, 47). On April 24, 1939, these consolidated causes were heard by said three-judge court thus convoked, and thereafter, on May 10, 1939, the Honorable Edward E. Cushman and John C. Bowen, District Judges, filed their written decision therein, and on said date the Honorable William Healy, United States Circuit Judge, filed his dissenting written decision therein (R. 52, 53, 56) (App. 1).

On June 9, 1939, a final decree was entered in said consolidated causes, sustaining the exceptions to said libels, denying the injunctive relief prayed for and dismissing said causes, from which final decree this appeal is taken (R. 58).

IV

SPECIFICATION OF ERRORS

The United States District Court for the Western District of Washington, Northern Division, erred in the following particulars:

1. In granting and in not denying and overruling the exceptions of the appellee John T. Clark to said libels herein and each of them, in that it appears from said libels and each of them that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the appellee Wm. A. Marshall, as Deputy Commissioner, under the Long-

shoremen's and Harbor Workers' Compensation Act, purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931 (R. 13), and pursuant to which said appellee purported to have obtained authority to and did issue and file a further compensation order and award of compensation on the 13th day of March, 1939 (R. 17), is unconstitutional and void, being in violation of the Fifth Amendment to the Constitution of the United States in granting to appellee John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and denying to appellants the equal protection of the laws enjoyed by other employers under the Longshoremen's and Harbor Workers' Compensation Act, similarly situated, and in depriving appellants of their property without due process of law.

2. In denying and in not granting the applications of the appellants and each of them for an interlocutory or permanent injunction in said consolidated causes, in that it appears from said libels and each of them that the facts therein alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the appellee Wm. A. Marshall, as Deputy Commissioner, under the Longshoremen's and Harbor Workers' Compensation Act, purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931 (R. 13), and pursuant to which said appellee purported to have obtained

authority to and did issue and file a further compensation order and award of compensation on the 13th day of March, 1939 (R. 17), is unconstitutional and void, being in violation of the Fifth Amendment to the Constitution of the United States in granting to appellee John T. Clark special privileges not accorded equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and denying to appellants the equal protection of the laws enjoyed by other employers under the Longshoremen's and Harbor Workers' Compensation Act, similarly situated, and in depriving appellants of their property without due process of law.

3. In dismissing these consolidated causes and the libels therein, and each of them, in that it appears from the libels and each of them that the facts alleged are sufficient to constitute a cause of action for the injunctive relief sought therein, and that Private Act No. 445 of the 74th Congress of the United States (49 Stat. 2244), pursuant to which the appellee Wm. A. Marshall, as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, purported to have obtained authority to and did review the compensation order and award of compensation of August 26, 1931 (R. 13), and pursuant to which said appellee purported to have obtained authority to and did issue and file a further compensation order and award of compensation on the 13th of March, 1939 (R. 17), is unconstitutional and void, being in violation of the Fifth Amendment to the Constitution of the United States in granting to appellee John T. Clark special privileges not accorded

equally to other employees subject to the Longshoremen's and Harbor Workers' Compensation Act, and denying to appellants the equal protection of the laws enjoyed by other employers under the Longshoremen's Compensation and Harbor Workers' Act, similarly situated, and in depriving appellants of their property without due process of law.

V

ARGUMENT

Summary of Argument

INTRODUCTORY

POINT A:

PRIVATE ACT NO. 445 GRANTS TO APPELLEE, JOHN T. CLARK, SPECIAL PRIVILEGES NOT ACCORDED EQUALLY TO OTHER LONGSHOREMEN SIMILARLY SITUATED, AND DENIES TO APPELLANTS THE EQUAL PROTECTION OF THE LAWS ENJOYED BY OTHER EMPLOYERS SIMILARLY SITUATED UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

1. "Due process of law" has the same meaning in both the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. "Due process of law" is equivalent to the "law of the land" requiring equal treatment of all persons similarly situated, and affords complete protection against arbitrary classification and discrimination by Congress.

POINT B:

PRIVATE ACT NO. 445 OF THE 74TH CONGRESS DEPRIVES APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW BY DESTROYING PROPERTY RIGHTS VESTED UNDER A PRIOR FINAL COMPENSATION ORDER MADE PURSUANT TO THE PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

1. The compensation order and award of August 26, 1931, is a final adjudication conferring upon appellants vested property rights.

2. The review authorized by Private Act No. 445 destroys the rights and obligations which were finally determined by the order and award of August 26, 1931.

3. Private Act No. 445 deprives appellants of substantive rights and is not merely procedural.

4. Private Act No. 445 attempts to create a new substantive right for the benefit of appellee John T. Clark and is not merely an amendment to the Longshoremen's and Harbor Workers' Compensation Act.

5. Private Act No. 445 is an attempted usurpation by Congress of judicial functions.

POINT C:

ILLUSTRATIVE DECISIONS CONSTRUING SIMILAR STATE ACTS.

ARGUMENT

Introductory

This appeal and the argument to follow relate solely to the constitutionality of Private Act No. 445 of the 74th Congress, entitled "An Act—For the Relief of John T. Clark of Seattle, Washington,"[9] and *a fortiori* the validity of the compensation order of March 13, 1939,[10] made by appellee Wm. A. Marshall, Deputy Commissioner, under the purported authority thereof.

The points raised by the Specification of Errors (pp. 13-16, supra) will be here dealt with and discussed under two main headings noted in the preceding Summary of Argument as *Point A* and *Point B*, under which the nature and effect of said Private Act No. 445 will be tested by the constitutional requirements of the "due process" clause of the Fifth Amendment to the Constitution of the United States.

Point C will be devoted to the discussion of the decisions of State Courts construing similar state legislation.

Preliminarily, we invite the Court to here consider the exact text of Private Act No. 445, which we quote as follows:

"AN ACT

"For the relief of John T. Clark, of Seattle, Washington.

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[9] 49 Stat. 2244.

[10] R. 17.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of Sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, That such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936." (49 Stat. 2244).

It will be observed that the very title of the Private ct discloses its "private" and special nature, being An Act—for the Relief of John T. Clark, of ashington," singling out and conferring its benefits on but one individual in a class of workmen subject the provisions of the Longshoremen's and Harbor orkers' Compensation Act.

The Private Act then proceeds to authorize a special view by the Employees' Compensation Commission of compensation order filed August 26, 1931 (R. 13), in hich disability compensation under the Longshoremen's nd Harbor Workers' Compensation Act was, after a ll hearing, terminated as of July 5, 1931, such review be in accordance with the procedure prescribed by ction 19 of the Longshoremen's and Harbor Workers'

Compensation Act, notwithstanding the plain prohibitions contained in Sections 21 and 22 of said Act[11] then and now in full force and effect and applicable to all other employees subject to its provisions. Similarly, the Private Act is applicable to but one employer and one insurance carrier (these appellants) and exhausts itself upon them alone, leaving available to all other employers and insurance carriers under the Longshoremen's and Harbor Workers' Compensation Act, similarly situated, the protection of finality afforded by Sections 21 and 22 of said Act, above noted. In short, Private Act No. 445 is patently discriminatory by arbitrarily singling out one employee of a class for its benefits and one employer and insurance carrier of a class for its burdens.

We are not here dealing with a congressional act predicated upon "natural and reasonable classification" since the plain wording of Private Act No. 445 forecloses the possibility of any such contention or construction. Previous decisions of this Court upholding congressional legislation founded upon "natural and reasonable classification" are therefore irrelevant to this inquiry.[12]

The finality of the compensation order of August 26, 1931, which confessedly involved no fraud, (R. 57) is recognized in the context of the Private Act, which then

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[11]See full text of Sections 21 and 22 of the Longshoremen's and Harbor Workers' Compensation Act set out in footnotes, pp. 8, 9, supra.

[12]Compare—

Charles C. Steward Mach. Co. v. Davis, 301 U. S. 548, 584, 81 L. ed. 1279, 1289 (1937); Barclay & Co. v. Edwards, 267 U. S. 442, 69 L. ed. 703 (1929); Nebbia v. N. Y., 291, U. S. 502, 525, 78 L. ed. 940, 950 (1934); State Tax Commission v. Jackson, 283 U. S. 527, 542, 75 L. ed. 1248, 1258 (1931).

proceeds to strike down the rights thus vested in appellants thereunder by directing a review and the issuance of a new compensation order despite "the provisions of Sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding."

It must be noted that the obligations which arise from a compensable "injury"[13] within the purview of the Longshoremen's and Harbor Workers' Compensation Act are private rights as distinguished from those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the Executive or Legislative Departments. The obligations thus created relate to the liability of one individual to another under the law as then existing and defined. *Crowell v. Benson*, 285 U. S. 22, 51, 76 L. ed. 598, 613 (1932). Clearly, the compensation order of August 26, 1931, was a final adjudication of such private rights between these appellants and appellee John T. Clark under the existing law.[14]

Private Act No. 445 does not involve the "spending power" of Congress but, on the contrary, and as stated by Circuit Judge William Healy in his dissenting opinion in this case in the District Court, "What Congress has done is to authorize an award of money for the relief of a private individual, payable not out of the public treasury, but out of the pockets of other private parties guilty of no fault."[15]

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[13]"Injury" and "Compensation" are defined in Sec. 902 of the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. A., §902 (2), (12)).

[14]Title 33 U. S. C. A., §921 (a) and cases cited at p. 44, infra.

[15]Paramino Lumber Co. et al. v. Marshall, et al., 27 F. Supp. 823, 825 (1939) (App. 6).

The Private Act under consideration is a classical example of tyrannical legislation—it establishes government by edict or discriminatory order and discards government by law. It is difficult to fathom the factors which motivated Congress in its passage when we consider that the unconstitutionality of Private Act No. 445 was recognized by the Senate Committee on Claims in its report No. 1645 of the 74th Congress of the United States, wherein it is stated in reference thereto:

> "Your Committee is frank to admit that it has had no other cases of this kind, and that, as stated by the Employees' Compensation Commission, a Private Act of this nature might be successfully attacked by the employer or the insurance company in the courts." (R. 5, 25) (App. 18).

Indeed, the United States Employees' Compensation Commission, whom appellee, Wm. A. Marshall, Deputy Commissioner, represents, in a communication addressed to the Senate Committee on Claims, and contained in the committee report above referred to, likewise recognized the unconstitutionality of Private Act No. 445, stating in reference thereto:

> "The proposed measure, * * * would no doubt be open to objection on constitutional grounds, among other things, because of its discriminatory nature in that it would grant a special privilege not accorded equally to other employees under the Act. It would also disturb vested rights. Similar state acts, so far as the Commission has noted, have uniformly been held unconstitutional or invalid, and in this connection the committee's attention is called to the following illustrative cases: Casieri's case (190 N. E. 118, Mass. 1934); and Roles Shingle Company v. Bergerson (19 Pac. (2d) 94, Ore. 1933).

"Aside from the fact that the draft of the proposed bill would impose upon the Commission a function in this particular case which is in the nature of a duty imposed under the Longshoremen's Act upon its deputy commissioners, the constitutional infirmity of the measure would leave little doubt that any order issued thereunder would be successfully attacked in court by the employer or insurance carrier." (R. 5, 6, 25) (App. 25).

The passage of this Private Act by Congress despite its obvious constitutional infirmities, as reflected by the report of the Senate Committee on Claims and the opinion of the United States Employees' Compensation Commission above set forth, serves to illustrate the more clearly the effects of political meddling upon a system of workmen's compensation, the social benefits of which cannot be seriously questioned or denied. Should such Private Act be permitted to stand unchallenged, the entire compensation law and system designed for the benefit of federal employees or workmen within the purview of the Longshoremen's and Harbor Workers' Compensation Act would be thrown into a state of confusion and turmoil, placing a premium upon political influence, with the result that the benefits to accrue to injured workmen under the Compensation Act would be measured only by their political potency, at the same time subjecting an injured employee's rights to the political manipulation of an unscrupulous employer or insurance carrier. The wisdom of the Fifth Amendment to the Constitution of the United States is best illustrated by contemplating the results which could follow a judicial declaration of the validity of such a Private Act as is now before this Court.

It is submitted that Private Act No. 445 is unconstitutional and the compensation order and award of March 13, 1939, made pursuant thereto, void, because said Private Act is repugnant to the "due process" clause of the Fifth Amendment to the Constitution of the United States in that:

POINT A:

PRIVATE ACT NO. 445 GRANTS TO APPELLEE JOHN T. CLARK SPECIAL PRIVILEGES NOT ACCORDED EQUALLY TO OTHER LONGSHOREMEN SIMILARLY SITUATED AND DENIES TO APPELLANTS THE EQUAL PROTECTION OF THE LAWS ENJOYED BY OTHER EMPLOYERS SIMILARLY SITUATED UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

1. "Due process of law" has the same meaning in both the Fifth and Fourteenth Amendments to the Constitution of the United States.

It has been frequently pointed out and is now well settled that the phrase "due process of law" has the same meaning in both the Fifth and Fourteenth Amendments. *Twining v. New Jersey*, 211 U. S. 78, 100, 101, 53 L. ed. 97, 107 (1908); *U. S. v. Armstrong*, 265 Fed. 683, 690 (D. C. Ind., 1920); *Heiner v. Donnan*, 285 U. S. 312, 326, 76 L. ed. 772, 779 (1932); *Bartlett Trust Co. v. Elliott*, 30 F. (2d) 700, 701 (D. C. Mo., 1929); *Hibben v. Smith*, 191 U. S. 310, 325, 48 L. ed. 195, 201 (1903).

For example, in *Twining v. New Jersey*, 211 U. S. 78, 100, 101, 53 L. ed. 97, 107 (1908), this Court said:

"First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 280, 15 L. ed. 372, 376 (approved in Hallinger v. Davis, 146 U. S. 314, 320, 36 L. ed. 986, 989, 13 Sup. Ct. Rep. 105; Holden v. Hardy, 169 U. S. 366, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; but see Lowe v. Kansas, 163 U. S. 81, 85, 41 L. ed. 78, 79, 16 Sup. Ct. Rep. 1031). *Of course, the part of the Constitution then before the court was the 5th Amendment. If any different meaning of the same words, as they are used in the 14th Amendment, can be conceived, none has yet appeared in judicial decision.*"*

And in *U. S. v. Armstrong*, 265 Fed. 683, 690 (D. C. Ind., 1920), it was said:

"By the simplest and plainest rules of construction, the words 'due process of law' must have the same meaning in the Fifth and Fourteenth Amendments."

See McGehee, *Due Process of Law* (1906), pp. 30-35.

2. "Due process of law" is equivalent to the "law of the land" requiring equal treatment of all persons similarly situated and affords complete protection against arbitrary classification and discrimination by Congress.

The phrase "due process of law," as used in the Fifth and Fourteenth Amendments, is derived from and has the same meaning as the "law of the land" as used in

*All italics supplied unless otherwise indicated.

Magna Charta, and embodies those same principles of justice and equal treatment of all men which inhere in the common law tradition. *Murray's Lessee v. Hoboken Land & Improv. Co.*, 18 How. 272 (U. S. 1856); *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616 (1877); *Bank of Columbia v. Okely*, 4 Wh. 235, 244 (U. S. 1819); *Ochoa v. Hernandez Y Morales*, 230 U. S. 139, 57 L. ed. 1427 (1913).

Originally, the "law of the land" in England was viewed as a curb on the executive branch of government only. *Hurtado v. California*, 110 U. S. 516, 531, 532, 28 L. ed. 232, 237 (1884); *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512, 519, 29 L. ed. 463, 465 (1885). However, it is now clear that the protection afforded by "due process of law" also extends to legislative action and judicial proceedings as well. *Missouri Pacific Ry. Co. v. Humes*, supra; *Murray's Lessee v. Hoboken Land & Improv. Co.*, supra; *Ex Parte Virginia*, 100 U. S. 339, 25 L. ed. 676 (1879).

While the *ideal of equal treatment* has been frequently said by this Court to inhere in the concept of "due process of law," perhaps the best exposition of this often-used but seldom-defined concept may be found in *Hurtado v. California*, 110 U. S. 516, 535, 536, 28 L. ed. 232, 238 (1884), in which this Court said:

> "* * * Due process of law in the latter (Fifth Amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority

from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

" * * * *

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. *It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case,* but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and *thus excluding, as not due process of law,* acts of attainder, bills of pains and penalties, acts of confiscation, *acts reversing judgments, and acts directly transferring one man's estate to another,* legislative judgments and decrees, *and other similar special, partial and arbitrary exertions of power under the forms of legislation.* Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. *And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions.* The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence

of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

The following cases likewise clearly demonstrate that arbitrary classification or discrimination by Congress is repugnant to the "due process" clause of the Fifth Amendment.

In *U. S. v. Armstrong*, 265 Fed. 683, 691 (D. C. Ind., 1920), the Court, in dealing with the Lever Act, which exempted from its operation farmers' and cooperative societies, considered the Fifth Amendment, stating:

> "It has been repeatedly held that the phrase 'law of the land,' as used in state constitutions, imports a general public law clearly binding upon every member of the community, which embraces all persons who are in or who may come into like situations and circumstances, and not partial laws affecting the rights of classes of individuals, and when applied to special or class legislation, it means in addition to that 'the classification must be natural and reasonable, not arbitrary and capricious.' "

and, quoting from Willoughby on the Constitution in this connection, said:

> "And Willoughby on the Constitution, pp. 873, 874, says:
>
> " 'The United States is not by the Constitution expressly forbidden to deny to any one the equal protection of the laws, as are the states by the first section of the Fourteenth Amendment. It would seem however, that the broad interpretation which the prohibition as to "due process of law" has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. *Thus it has been repeatedly declared that enactments of a Legislature directed against particular individuals or corporations,*

or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, *amounts to a denial of due process of law* so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws "operate on all alike," and do not subject the individual to an arbitrary exercise of the powers of government.'"

and in conclusion, stated:

"Hence I conclude that *an arbitrary classification by Congress is repugnant to the 'due process' clause of the Fifth Amendment. The power to make an arbitrary classification is arbitrary power, and arbitrary power has no place in our system of government. Ours is a government of law, not of men.*"

And in *U. S. v. Yount*, 267 Fed. 861, 863 (D. C. Pa., 1920), the court, in considering the Fifth Amendment, said:

"First. The 'due process of law,' by which Congress is limited in the Fifth Amendment, and the states by the Fourteenth Amendment, is equivalent to the 'law of the land,' and is intended to protect the citizen against arbitrary action, and secure to all persons equal and impartial justice under the law. * * *

"Second. *It seems reasonably clear that the 'due process of law' provision of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the laws,' which no state may deny to any person under the provisions of the Fourteenth Amendment.* Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. ed. 225; Glozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. ed. 599."

In *Leeper v. Texas*, 139 U. S. 462, 468, 35 L. ed. 225, 227 (1891), it was said:

"* * * Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And in *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. ed. 599, 601 (1893), it was again said:

"* * * And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In *Bank of Columbia v. Okely*, 4 Wh. 235, 244 (U. S. 1819), it was said:

"* * * As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

In *Caldwell v. Texas*, 137 U. S. 692, 697, 34 L. ed. 816, 818 (1891), it was said:

"* * * And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

In *Southern Bell Telephone & Telegraph Co. v. Calhoun*, 287 Fed. 381, 384 (D. C. S. C., 1923), the court stated:

"* * * It is an essential characteristic of a democratic government that its citizens shall equally enjoy the protection of its laws, and that no one shall be deprived of his property without due process of law. Any form of government, therefore, in which

an opposite policy prevails or is permitted, is by such fact, in the universal estimation of mankind, characterized as arbitrary and despotic. It is true that theoretically at least a democracy may enact laws as discriminatory and tyrannical as an absolute monarchy, and the modern world is not without striking and tragic examples thereof. Happily, however, a different system prevails in America, and constitutional barriers have been erected by state and nation against any governmental exercise of unfair discrimination against any citizen and against arbitrary confiscation of his property."

In *U. S. v. Ballard*, 12 F. Supp. 321, 326, 327 (D. C. Ky., 1935), we find:

" * * * 'Due process of law' has been defined many times as meaning the law of the land, and *the law of the land implies a general public law equally binding upon every member of the community, which embraces all persons who are in, or who may come into, like situations and circumstances, and not partial laws affecting rights of classes of individuals;* and when applied to special or class legislation, it means in addition that the classification must be natural and reasonable, not arbitrary and capricious. *Purely arbitrary orders directed against individuals or classes are not the law of the land.* One of the requirements of the Fifth Amendment is that no person shall be deprived of life, liberty, or property without due process of law."

And in *Wallace v. Currin*, 95 F. (2d) 856, 867 (C. C. A. 4, 1938), it is said:

"It is true that arbitrary discrimination between persons in similar circumstances would violate the due process clause; * * *."

and this Court on appeal in the case of *Currin v. Wallace*, 83 L. ed. Adv. Op. 413, 419 (1939), said:

"If it be assumed that there might be discrimina-

tion of such an injurious character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce power renders the action of Congress invalid."

In *Pryor v. Western Paving Co.*, 184 Pac. 88, 90 (Okla., 1919), the court stated:

"* * * But in its most accepted and best understood application, *due process of law simply means a general and public law operating equally on all persons in like circumstances.* It does not mean a partial law operating upon the rights of a particular person, or exhausting itself upon his life, liberty, or property in a way in which the same rights of all persons in like circumstances are not affected. *The law must embrace and affect the rights of all persons in like circumstances equally*, and the law must be just and reasonable, and not arbitrary and capricious. *It is a denial of due process of law to single out an individual of a particular class and hamper him with the imposition of restraint*, not borne by all members of the same class or community at large. A law operating and exhausting itself upon the rights of a particular person, denying him rights that are enjoyed by others in the community as a whole, must fall, as it denies equal protection of the law."

In the leading case of *Vanzant v. Waddel*, 2 Yerg. 260, 269, 270 (Tenn., 1829), it was stated:

"The clause 'law of the land,' means a general and public law, equally binding upon every member of the community. * * * The right to life, liberty and property, of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or 'land,' under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by afford-

ing remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another. The idea of a people through their representatives making laws whereby are swept away the life, liberty and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subject against odious exceptions, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as part of our constitution."

In the case of *Sims v. Rives*, 84 F. (2d) 871, 878 (C. A. D. C., 1936), (Cert. denied 298 U. S. 682, 80 L. ed. 1402 (1936)), the Court of Appeals for the District of Columbia in considering the effect of the Fifth Amendment, said:

"Within its plenary power to legislate for the District of Columbia, Congress is, of course, subject to all of the constitutional limitations upon the exercise of federal power, including the Fifth Amendment. This is recognized in Capital Traction Com- v. Hof, and District of Columbia v. Kraft, supra. The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws. Lappin v. District of Columbia, 22 App. D. C. 68. But equal protection of the laws means merely that a law must deal alike with all of a given class within the jurisdiction to which the law is applicable."

See also *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597 (1900); *Barclay v. Edwards*, 267 U. S. 442, 450, 69 L. ed. 703 (1924).

Compare the dicta in *Truax v. Corrigan*, 257 U. S. 312, 331, 332, 66 L. ed. 254, 262, 263 (1921), wherein a distinction between "due process" and "equal protection" was suggested.[16] In this connection it will be observed that the suggested distinction shares with others on the same topic a tendency toward generality, toward definiteness in form, but a vagueness in content.

It seems clear, therefore, that the "due process of law" provision of the Fifth Amendment is broad enough

[16] In Truax v. Corrigan, 257 U. S. 312, 331, 332, 66 L. ed. 254, 262, 263 (1921), it was stated:

"This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any state to deny to any person the equal protection of the laws. The clause is associated in the amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. * * * The due process clause requires that every man shall have the protection of his day in court and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgments only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. * * * It of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

in its scope and purpose to include the "equal protection" clause specifically set forth in the Fourteenth Amendment when testing and applied to congressional legislation of an arbitrary or discriminatory nature, not founded upon natural or reasonable classification. This principle has found almost universal recognition among text writers.

For example, in *Willoughby on the Constitution* (2nd Ed.), (1929), pages 1928, 1929, it is said:

> "* * * it is still difficult to say precisely in what specific respects the prohibition of the denial of equal protection of the laws operates to impose restraints not already covered by the prohibition with regard to the depriving of persons of life, liberty or property without due process of law. * * *.
>
> "From what has been said it is clear that in many cases laws which have been held invalid as denying due process of law might also have been so held as denying equal protection of the law or vice versa, and that, in fact, in not a few cases the courts have referred to both prohibitions leaving it uncertain which prohibition was deemed the most pertinent and potent in the premises."

And again, in *Story on the Constitution* (5th Ed.), (1891), pages 705, 706, the learned author states:

> "The provision that no state 'shall deny to any person within its jurisdiction the equal protection of the law' would not seem to call for much remark. Unquestionably every person—all now being free men—is entitled to the equal protection of the laws without any such express declaration.
>
> "* * * *
>
> "It is to be observed further, that this clause, of its own force neither confers it nor gives privileges; its sole office is to ensure impartial legal protection to such as under the laws may exist. It is a formal declaration of the great principle that has been

justly said to pervade and animate the whole spirit of our constitution of government that all are equal before the law: * * *."

The restraint imposed upon Congress by the Fifth Amendment against arbitrary discrimination was plainly applied in *Lappin v. District of Columbia*, 22 App. D. C. 68, 75 (1903), in which a congressional act imposing license fees on persons doing business in the District of Columbia, making a distinction between residents and non-residents, was held unconstitutional on the ground that it was discriminatory, and hence a taking of property without due process of law. The court declared:

> "It must be conceded that the Fourteenth Amendment, which expressly declares that no state shall deny to any person within its jurisdiction the equal protection of the laws, does not purport to extend to authority exercised by the United States. (Citing cases). But it does not follow that Congress in exercising its power of legislation within and for the District of Columbia may, therefore, deny to persons residing therein equal protection of the laws.
>
> "All of the guarantees of the Constitution respecting life, liberty, and property are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as of those residing in the several states. (Citing cases).
>
> "The statute, as we are constrained to regard it, by imposing an unreasonable burden upon the right of a citizen to pursue a lawful occupation open to his competitors, upon less onerous terms—which right of occupation is, as we have seen, of the nature of property—operates substantially as the taking of property without due process of law, and is therefore within the prohibition of the Fifth Amendment of the Constitution."

While it may be true that the states are inhibited by "specific guaranty" of equal treatment (Fourteenth mendment), nevertheless if anything may be regarded s firmly settled in our constitutional form of government s regards that often used, but seldom defined concept due process of law" as contained in both the Fifth and ourteenth Amendments, it is: that due process of w" is violated by a legislative, executive or judicial xertion of power founded upon arbitrary discrimination. uch protection is at least embraced within the "required inimum" secured by the "due process" clause. *Truax v. orrigan*, 257 U. S. 312, 331, 332, 66 L. ed. 254, 262, 63 (1921) (note 16, page 34).

The court is not here called upon to substitute its udgment for that of the legislative body responsible for his Private Act. No question of "reasonable" or any ther classification is presented for consideration. Private ct No. 445, singling out one individual for its benefits nd these appellants for its burdens, exhausts itself upon he parties to this litigation alone. Being plainly arbitrary nd discriminatory upon its face, this Private Act, even hen tested by the "minimum requirements" of "due rocess," must be condemned.

Thus the suggested distinction, if any, between "due rocess" and "equal protection," as intimated in *Truax Corrigan*, supra, becomes irrelevant to this inquiry.

The decisions of this and other courts, examined above, ompel condemnation of this Private Act as violative of ie most fundamental concept of "due process" however eneficent the purpose of this Private Act or the in-

tentions of its proponents.[17]

Equality of application of the law is synonomous with "due process,"—unreasonable and discriminatory classification is its antithesis. Neither in terms nor by implication does Private Act No. 445 attempt classification, reasonable or otherwise. It is plainly arbitrary and discriminatory and must be declared repugnant to the constitutional guaranty of "due process of law" embodied in the Fifth Amendment.

POINT B:

PRIVATE ACT NO. 445 OF THE 74TH CONGRESS DEPRIVES APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW BY DESTROYING PROPERTY RIGHTS VESTED UNDER A PRIOR FINAL COMPENSATION ORDER MADE PURSUANT TO THE PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Diligent research has failed to reveal any instance in which Congress has by Private Act determined private rights between two individuals singled out for such treatment. With unbroken uniformity the private acts of Congress have been appropriations in the form of pensions or private grants of relief enacted under the authority of the spending power of Congress, the limitations on which power this court has not yet been called upon to define. And it would appear under the doctrine of *Massachusetts v. Mellon*, 262 U. S. 447, 67 L. ed. 1078 (1923), that even though this power were limited by the

[17]See Report of Senate Committee on Claims (App. 13).

equivalent of an "equal protection clause" these private appropriations could not be subjected to judicial review.

Our research has revealed but two cases in which an attempt by Congress to determine property rights of private individuals has been considered. In *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49 (1899), Congress by joint resolution had authorized the Secretary of the Interior to approve a lease made by the successor in interest of the grantee of certain Indian lands to the defendant as against a prior lease which had been made to the plaintiff. In holding ineffective this attempt of Congress to alter the property rights among the parties this Court stated:

> "The title of the strip of land in controversy, having been granted by the United States to the elder chief * * * and have descended * * * to his eldest son and successor * * *, passed to the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be devested by any subsequent action of the lessor, or by Congress, or of the executive departments." (p. 32).

In the second of these cases, *Pocono Pines Hotels Co. v. U. S.*, 73 C. Cls. 447 (1932), a situation closely approximating the problem presented by the case at bar was considered. The precise question litigated involved the validity of a Congressional act remanding the case to the Court of Claims for a further investigation of the facts. This act was construed merely to authorize an advisory legislative investigation by the Court which in no wise disturbed the judgment which had been theretofore awarded the plaintiff. However, in a well-reasoned opinion, the court considered at length a proposed

measure which Congress had rejected in favor of the statute in question. Concerning this proposed measure which would have ordered a new trial in the cause, the court declared that such a statute would unconstitutionally deprive the plaintiff of vested property rights, stating:

"The language employed in the rejected amendment is precise and free from ambiguity; its purpose and intent may not be misconstrued. The challenge as to its validity went uncontradicted, in so far as it was predicated upon the exercise of judicial power by Congress. Contentions as to its validity were predicated upon this court's jurisdiction and the finality of its judgments. *It nowhere appears that any suggestion was advanced in the enactment of such legislation with reference to a court other than this one it would be aught else than the exercise by Congress of judicial and not legislative power.* The court is of unanimous opinion that if this were the sole issue in this case, the plaintiff's motion to vacate the order of reference heretofore made would have to be allowed. In keeping with established precedents and in accord with what the law establishes, there is but one tribunal of the United States which may direct this court to grant a new trial in a case adjudicated by this court under section 145 of the judicial code, and that tribunal is the Supreme Court of the United States" (pp. 498-499).

"Of course, Congress may by special act waive any defense it may have, either legal or equitable, to a suit in this court. By so doing, no rights of the person asserting the claim are prejudiced and no property rights invaded. On the contrary, they are enlarged. *A pronounced and vitally different situation exists where the plaintiff has procured a valid judgment against the United States and it is sought to subject its permanency to the hazard of a new trial. A judgment if lawful is property and so recognized by law.*

> Congress has frequently waived by special act defenses which were avilable to the United States in the prosecution of claims in this court. Suits of Indian tribes invariably involve the statute of limitations and legal and equitable rights. Numerous cases, quite too many to cite, may be found in the reports of the court where Congress impressed with the equitable justice of the plaintiff's demand, and convinced that save for technical defenses the plaintiff would have recovered judgment, has waived the same by special act and the cases have been adjudicated by this court under such acts. *Such proceedings and the jurisdiction of the court with respect thereto bear no analogy whatever to the situation involved in the present controversy*'" (pp. 495-496).

1. The compensation order and award of August 26, 1931 is a final adjudication conferring upon appellants vested property rights.

It is universally recognized that a valid, final judgment confers vested property rights which cannot be altered by subsequent legislation. *United States v. Peters*, 5 Cranch 115, 136 (U. S. 1809); *McCullough v. Virginia*, 172 U. S. 102, 125, 43 L. ed. 382, 390 (1898); *Memphis v. United States*, 97 U. S. 293, 297, 24 L. ed. 920, 923 (1878); *Hoyt Metal Co. v. Atwood*, 289 Fed. 453, 454, 455 (C. C. A. 7, 1923); *Gilman v. Tucker*, 28 N. E. 1040 (N. Y. 1891).

As stated by Chief Justice Marshall in *United States v. Peters*, supra:

> "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. * * *."

Thus, judgments awarding continuing payments are property, and it is not competent for the legislature to

take away such vested right by providing in subsequent legislation for a modification of such decrees, which were final and unalterable as of the date of their rendition. *Blethen v. Blethen*, 32 Pac. (2d) 543 (Wash. 1934); *Livingston v. Livingston*, 66 N. E. 123 (N. Y. 1903). So also is the same protection afforded property rights vested by virtue of an administrative determination. *Noble v. Union River Logging Co.*, 147 U. S. 165, 37 L. ed. 123 (1893).

Likewise, the same protections are afforded to a defendant under a final judgment as to a plaintiff. *Springstun v. Springstun*, 229 Pac. 14 (Wash. 1924). Thus in *Germania Savings Bank v. Suspension Bridge*, 54 N. E. 33 (N. Y. 1899), it was held that a judgment of dismissal vested such rights in the defendant that the legislature could not authorize an appeal after the time for appeal under existing law had elapsed, the court stating:

> " * * * The legislature has control of remedies so far as they affect existing actions. This control includes the power to extend the time to appeal, or to grant a new right of appeal, provided some time yet remained, according to the law in force when the legislature acted, within which an appeal might have been taken. *If, however, according to the law existing when the statute extending the time to appeal, or granting a new right of appeal, was passed, the judgment had become final and unalterable, because no further right of appeal existed, then the judgment conferred a vested right, and was property, of which the owner could not be deprived by an act of the legislature, or otherwise than through due process of law.* An appeal brought pursuant to a statute which authorizes an appeal after the time provided by law had expired, or authorizes a further appeal after the only appeal authorized by law had been brought and

finally decided, although it might result in the reversal of the judgment, and be in form a judicial proceeding, would not be what is known as 'due process of law,' which is not satisfied by a judgment based upon an unconstitutional statute. * * *."

A compensation order under the Longshoremen's and Harbor Workers' Compensation Act is a final determination of "private right, that is, of the liability of one individual to another under the law as defined." *Crowell v. Benson*, 285 U. S. 22, 51, 76 L. ed. 598, 613 (1932). And an award issued pursuant to said Act[18] embodies the statutory liability imposed by the Act[19] and the duty to pay such an award[20] is an obligation enforceable in a court of law[21]. A more clearcut determination of vested property rights is difficult to conceive. Judge Van Syckel in his dissenting opinion to *Moore v. State*, 43 N. J. L. 203, 243 (1881), has defined vested rights in the following manner:

> "In the widest sense they are rights which are complete and consummated, so that nothing remains to be done to fix the right of the citizen to enjoy them."

It would seem to be beyond question that the relationships fixed by a final compensation order constitute vested rights. The rights of these appellants were well characterized by Justice Story writing in *Trustees of Darthmouth College v. Woodward*, 4 Wh. 518, 699 (U. S. 1819), who stated:

"The truth, however, is, that all incorporeal

[18]Title 33 U. S. C. A., §919.
[19]Title 33 U. S. C. A., §904.
[20]Title 33 U. S. C. A., §914.
[21]Title 33 U. S. C. A., §918.

hereditaments, whether they be *immunities*, dignities, offices, or franchises, or other rights are deemed valuable in law. The owners have a legal estate and property in them. * * *."

Subject only to the statutory provisions for review and modification[22] an award is a final determination of all questions involved in the litigation and the rights and liabilities affixed therein are immune from further alteration. *Shugard v. Hoage*, 89 F. (2d) 796 (C. A. D. C. 1937); *Mille v. McManigal*, 69 F. (2d) 644 (C. C. A. 2, 1934); *Associated Indemnity Corp. v. Marshall*, 71 F. (2d) 235 (C. C. A. 9, 1934); *Campbell v. Lowe*, 10 F. Supp. 288 (D. C. N. Y., 1935); *Didier v. Crescent Wharf & Warehouse Co.*, 15 F. Supp. 91 (D. C. Cal. 1936); *Globe Stevedoring Co. v. Peters*, 57 F. (2d) 256 (D. C. Tex. 1931); *Bulczak v. Independent Pier Co.*, 17 F. Supp. 973 (D. C. Pa. 1937); *United Fruit Co. v. Pillsbury*, 55 F. (2d) 369 (D. C. Cal., 1932). See also *Twine v. Locke*, 68 F. (2d) 712 (C. C. A. 2, 1934).

As has been stated in *United Fruit Co. et al, v. Pillsbury*, 55 F. (2d) 369, 370, 371 (D. C. Cal., 1932):

> " * * * the act says that a compensation order becomes 'final at the expiration of the thirtieth day' where the compensation order has not been suspended or set aside by injunction. The text of the act shows a congressional intent to have final awards and termination of litigation. To give a different interpretation would require judicial legislation by decision. If a different interpretation were to be followed, a deputy commissioner could reserve jurisdiction by inserting this same provision in each and every case and there would be no known termination of litigation. This is obviously not the intent of

[22] 33 U. S. C. A., §§21, 22, quoted supra note 5, p. 8.

the law as written. The deputy commissioner was therefore without power or jurisdiction to reopen the proceeding after it had become final or to hold a hearing on August 20, 1931, or to issue another and new and different order and award on August 31, 1931."

The United States Employees' Compensation Commission in a letter to the House Committee on Claims, commended the rejection of Private Act No. 445 and aracterized the rights of these appellants in the follow- g language:

"The deputy commissioner in the administration of the Longshoremen's Act performs quasi-judicial functions in determining the respective rights of the parties under the act. The adjudication of claims under the act vests a species of property rights in the interested parties which the Commission believes cannot be disturbed after they have become final and no longer subject to review as provided by the act."[23]

2. The review authorized by Private Act No. 445 estroys the rights and obligations which were nally determined by the order and award of ugust 26, 1931.

The courts have been uniform in declaring that the gislature is powerless to subject litigants to a further ppeal, review or new trial where the time for such rocedure has elapsed under applicable existing statutes, sing their decisions on the ground that such action

[23]Appendix, p. 25.

would destroy property rights vested by the prior final adjudication.[24]

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[24] *In the following cases it has been held that:*

(a) *The legislature cannot authorize an appeal or bill of review where the time for such review has lapsed:* Atkinson v. Dunlap, 50 Me. 111 (1862); Bates v. Kimball, 2 D. Chip. 77 (Vt. 1824); Beaupre v. Hoerr, 13 Minn. 366 (Gil. 339-1868); Durham v. Lewiston, 4 Me. 140 (1826); Germania Savings Bank v. Suspension Bridge, 54 N. E. 33 (N. Y. 1899); Gomph v. Wolfinger, 65 N. E. 878 (Ohio 1902); Hill v. Town of Sunderland, 3 Vt. 507 (1831); Lancaster v. Barr, 25 Wis. 560 (1870); Lewis v. Webb, 3 Me. 326 (1825); Story v. Runkle, 32 Tex. 398 (1869); Trim v. McPherson, 7 Coldw. 15 (Tenn. 1869); Wieland v. Shillock, 24 Minn. 345 (1877); Willoughby v. George, 5 Colo. 80 (1879); Woodman v. Fulton, 47 Miss. 682 (1783). See also: Ely v. Holton, 15 N. Y. 595 (1857); McAbe v. Emerson, 18 Pa. 111 (1851); People v. Carnal, 6 N. Y. 463 (1852); Pocono Pines Hotels Co. v. United States, 73 C. Cls. 447 (1932).

(b) *The legislature cannot order a new trial or a rehearing of a cause where the time for such procdeure has elapsed under existing statutes:*

Davis v. Menasha, 21 Wis. 491 (1867); DeChastellux v. Fairchild, 15 Pa. St. 18 (1850); Dorsey v. Dorsey, 37 Md. 64 (1872); Petition of Siblerud, 182 N. W. 168 (Minn. 1921); In re Greene, 60 N. E. 183 (N. Y. 1901); In re Hendley's Estate, 49 Pac. 829 (Utah 1897); Marpole v. Cather's Administrator, 78 Va. 239 (1883); Merrill v. Sherburne, 1 N. H. 199 (1818); Burch v. Newbury, 10 N. Y. 374 (1852); Peerce v. Kitzmiller, 19 W. Va. 564 (1882); Ratcliffe v. Anderson, 31 Gratt. 105 (Va. 1878); Sanders v. Cabaniff, 43 Ala. 173 (1869); State ex rel. Flint v. Flint, 63 N. W. 1113 (Minn. 1895); Taylor & Co. v. Place, 4 R. I. 324 (1856); Trustees Fund v. Bailey, 10 Fla. 238 (1864); See also: People v. Frisbie, 26 Cal. 135 (1864).

(c) The following miscellaneous cases have also held that the rights and obligations determined by a final adjudication are immune from further legislative alteration.

Tate's Executors v. Bell, 4 Yerger 202 (Tenn. 1833), (Special act authorizing plaintiff to "revive" judgment in their name, held unconstitutional);

Hunter v. United States, 10 F. Supp. 1014 (D. C. Mo. 1935), ("Reinstatement" of a claim after judgment of dismissal held unconstitutional);

In re Opinion of The Justices, 127 N. E. 635 (Mass. 1920), (Act "Superseding" a judgment declared unconstitutional);

Denny v. Mattoon, 2 Allen 361 (Mass. 1861), (Legislative attempt to "annul" a judgment held unconstitutional).

Legislative attempts to reopen final awards under State Workmen's Compensation statutes where the time for such procedure has elapsed have also uniformly been held ineffective. These cases presenting a situation identical with the case at bar will be discussed, infra, pages 61-65.

It may also be suggested that Private Act No. 445 deprives appellants of property without due process of law by destroying contractual obligations in that the then existing statutory provisions of the Longshoremen's and Harbor Workers' Compensation Act entered into and formed a part of the contractual relation of employment between appellants and appellee. Compare *Warner v. Zaiser*, 239 N. W. 761 (Minn. 1931); *Preveslin v. Derby etc. Co.*, 151 Atl. 518 (Conn. 1930); *Reynolds v. E. Clemens Horst Co.*, 170 Pac. 1082 (Cal. 1918). While it is recognized that there is no specific constitutional prohibition against Congressional impairment of the obligations of contract, this Court has nevertheless held that Congress cannot destroy property rights which have been established by contractual obligations. *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. ed. 1593 (1935).

An analogous situation illustrating the immunity from legislative modification of rights and obligations determined by a final adjudication is to be found where redemption rights in mortgage foreclosures have become final under the existing state legislation. It has been

held[25] that Congress cannot validly extend the redemption period for mortgages where (a) the period of redemption has expired prior to enactment of the Congressional Act, *In re Lowmon*, 79 F. (2d) 887 (C. C. A. 7-1935); *In re Young*, 12 F. Supp. 30 (D. C. Ill. 1935); compare: *In re Sherman*, 12 F. Supp. 297 (D. C. Va. 1935); or (b) where foreclosure has been prosecuted to sale, *In re Weise*, 12 F. Supp. 871 (D. C. N. Y. 1935); nor (c) can a state validly extend the period of redemption when all rights have been finally determined under existing law. *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93 (1896); *Phoenix Joint Stock Land Bank v. Dewey*, 8 F. Supp. 678 (D. C. Kan. 1934); compare: *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413 (1934).

3. Private Act No. 445 deprives appellants of substantive rights and is not merely procedural.

With no evident attempt to analyze Private Act No. 445, nor to test it effects by any recognized criteria of constitutionality the majority of the court below was content to rest its decision upon the case of *Williams v. Norris*, 12 Wh. 117 (U. S. 1827), which case apparently rendered "this three-judge district court unable to rule without doubt that the Private Act of Congress for the relief of John T. Clark here assailed is unconstitutional."[26]

In *Williams v. Norris*, 12 Wh. 117 (U. S. 1827) one Norris had made entry to certain lands in North Carolina.

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[25]The Frazier-Lempke Act (48 Stat. 1289, 11 U. S. C. A. §203) was held unconstitutional on other grounds. Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593 (1935). Compare: Wright v. Mountain Trust Bank, 300 U. S. 440, 81 L. ed. 736 (1937).

[26]Appendix, p. 4.

under whose law such entries were capable of being perfected and carried into grant as the legislature might direct. Certain transfers of the land and the power to perfect such entries thereafter occurred which vested in Tennessee the power to perfect these entries. General legislation prescribed procedure to be followed for perfecting such land entries into grant. Following Norris' entry a patent was issued by Tennessee to one Williams covering the lands in question. Thereafter a private act was passed by Tennessee providing for the procedure whereby Norris might perfect his prior entry into grant. Contesting the right of Norris to the lands in question, Williams contended that the private act was a law impairing the obligation of contract, i. e., Williams' patent. The court stated regarding the private act in question (pp. 126-129):

> "In determining * * * its effect, it is necessary to inquire whether Norris' entry was absolutely void, or gave an incipient title, capable of being carried into grant. * * *.
>
> " * * * .
>
> "Entries * * * though not accompanied by the purchase-money were not absolutely void but would become valid should the purchase-money be afterwards paid; * * * proof of payment might be received as the legislature should prescribe. * * *.
>
> "Had the claim of Norris been decided * * * under general law, it would probably never have been contested. What difference is there, so far as respects its constitutionality between the act passed in his particular case, and the act containing a general reference of all cases of the same description to the Commissioner? The difference consists solely in this: the general act admits no other proof of pay-

ment than a certificate from the Comptroller of North Carolina; the particular act authorizes the commissioner to establish the claim on sufficient evidence. * * *. We know of no principle which could impose on the legislature of the State the necessity of exacting from the claimant * * * as indispensable to the establishment of his claim, a certificate from the comptroller of North Carolina, that the purchase-money had been paid. * * * If, then, the general act of Tenessee had allowed the commissioner to issue warrants on sufficient proof, such act might have been questioned on the ground of policy, but not of right.

"If this be correct, if the legislature might have dispensed with this testimony in a general law, why might it not be dispensed with in a particular law, where its effect on the cause is precisely the same as if it had been general? * * *.

"The act 'for the relief of Ezekiel Norris,' did not authorize the commissioner to grant him a certificate or warrant on his entry, unless he should prove that the purchase-money had been paid. The laws had preserved such entries, and, consequently, an act to enable the proprietor of one of them to prosecute his claim, is not necessarily an act impairing the obligation of a contract.

" * * *.

"We are of opinion that this record does not exhibit a case of which this court can take jurisdiction, and that the writ of error ought, therefore, to be dismissed."

It is submitted that this case of *Williams v. Norris* is no authority for the constitutionality of Private Act No. 445.

The Private Act there in question was remedial only and merely provided the procedure whereby one Norris was to prove the payment of the purchase-money of a land

entry which he was seeking to perfect. The particular procedure afforded Norris, worked no hardship on other claimants whose rights were secured under the general law. Nor were vested property rights as between private individuals destroyed, the act being solely concerned with the perfection of title to state public lands, the plenary power of disposition of which was vested in the state legislature. That portion of the opinion relied on by the Court below is irrelevant to the case at bar since the question there being considered was whether the act impaired the obligation of contract. Furthermore, the state statute there involved was passed and considered prior to the enactment of the Fourteenth Amendment at a time when there was no federal constitutional prohibition against discriminatory state legislation. Finally, that portion of the opinion relied on is entirely *obiter dictum*, as the Court dismissed the writ of error and failed to take jurisdiction.

Private Act No. 445 is not merely remedial and does not purport to modify the procedure whereby an existing cause of action may be enforced. A situation to be distinguished is involved in the case of *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483 (1885), much relied on by appellees. It was there held that a state statute reviving a contract cause of action barred by a statute of limitations does not violate the Fourteenth Amendment since the statute barred only the remedy and the duty to pay still existed. It is submitted that that case is entirely inapplicable to the case at bar for the following reasons:

(a) The statute there involved was one of general application to all persons similarly situated. Compare

Holden v. James, 11 Mass. 396 (1814) wherein the Massachusetts court held unconstitutional a statute purporting to revive the claim of a single individual barred by a limitation statute, stating:

> "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution, and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subject to losses, damages, suits, or actions from which all others under like circumstances are exempted."(p.405)

See also *Bagg's Appeal*, 43 Pa. St. 512 (1862).

(b) Assuming that the statutory right to file a claim for the reopening of an award and for additional compensation is in the nature of a continuing cause of action (compare *Mattson v. Department of Labor and Industries*, 293 U. S. 151, 79 L. ed. 251 (1934)), the time limitation is inseparably tied up with the right given by the statute. *Young v. Hoage*, 90 F. (2d) 395 (C. A. D. C. 1937); *Ayers v. Parker*, 15 F. Supp. 447 (D. C. Md. 1936); *Kobilkin v. Pillsbury*, 103 F. (2d) 667 (C. C. A. 9, 1939).

In the case of such statutory causes of action it has been uniformly held that the lapse of the time limit not only bars the remedy but destroys the liability as well and any attempt of the legislature retroactively to revive such causes of action constitutes a deprivation of property without due process of law. *Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U. S. 633, 69 L. ed. 1126 (1925); *Peninsula Produce Exchange v. New York P. & N. R. Co.*, 137 Atl. 350 (Md. 1927), affirmed 276 U. S. 599, 72 L. ed. 724 (1928). See also *New York Central*

R. Co. v. Lazarus, 278 Fed. 900, 904 (C. C. A. 2, 1922); *Wenatchee Produce Co. v. Great Northern Ry. Co.*, 271 Fed. 784, 785 (D. C. Wn. 1921). In the *Danzer* case, which well points out the limited application of *Campbell v. Holt*, an action was brought to recover damages awarded by the Interstate Commerce Commission in a reparation hearing. The right to file the claim with the Interstate Commerce Commission had expired prior to the enactment of Sec. 206 (f) of the Transportation Act which purported to eliminate the period of Federal control from computation of time, thus making the filing of the claim timely. In upholding dismissal of the action, the court said:

> "* * * the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff * * *.
>
> "* * *.
>
> "* * * Section 206 (f) will not be construed retroactively to create liability. To give it that effect would be to deprive defendant of its property without due process of law, in contravention of the 5th Amedment."

(c) Finally, the rationale of *Campbell v. Holt* is entirely inapplicable to a situation as in the case at bar where a final adjudication of the claim in question has taken place. The law has wisely recognized the necessity of finality in litigation whereby the rights and obligations between individuals as they relate to particular transactions are determined once and for all time.

Accordingly, it is well established that recovery of a judgment extinguishes the original cause of action which is viewed as swallowed up in or merged in the judgment

so as to preclude suit on the original action. *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466 (1884). See also *United States v. Price*, 9 How. 83, 93-94, 13 L. ed. 56, 60 (U. S. 1894); *United States v. Ames*, 99 U. S. 35, 44-45, 25 L. ed. 295, 300 (1878); *Sessions v. Johnson*, 95 U. S. 347, 347-348, 24 L. ed. 596 (1877).

As stated by Justice Brandeis in *Hamer v. New York Railways Co.*, 244 U. S. 266, 272, 61 L. ed. 1125, 1129 (1917):

> "The rights on the original guaranty * * * were merged in the judgment. * * * For the recovery of the judgment extinguished through merger the original cause or causes of action. * * *."

It is said in *United States v. Leffler*, 11 Pet. 86, 100-101, 9 L. ed. 642, 647 (U. S. 1837):

> "If there by any one principle of law settled beyond all question, it is this, that whensoever a cause of action in the language of the law, *transit in rem judicatum*, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever."

Nor is it material for the purpose of merger that an appeal is being prosecuted. *Moore v. Williams*, 24 N. E. 619 (Ill. 1890).

The compensation order and award of August 26, 1931 was, therefore, a final adjudication of the rights and liabilities arising out of the injuries suffered by appellee Clark which served to extinguish the cause of action as such. The statutory period for review (30 days) having admittedly expired, this compensation order and award was protected against review, appeal, reopening or rehearing (see pp. 44-45, supra) and the order of March

13, 1939 (R. 17) (App. 10), made under the purported authority of Private Act No. 445, attempted to determine liability on a cause of action which no longer existed, thereby depriving appellants of their property without due process of law.

4. Private Act No. 445 attempts to create a new substantive right for the benefit of appellee John T. Clark and is not merely an amendment to the Longshoremen's and Harbor Workers' Compensation Act.

Private Act No. 445 by its very terms does not purport to amend the Longshoremen's and Harbor Workers' Compensation Act. All other rights and liabilities vested under that Act in the past and all those to accrue in the future remain unaffected by Private Act No. 445 whose sole force and effect is directed toward and exhausted upon the legal relationships of the parties to this litigation. The cause of action created by the Longshoremen's and Harbor Workers' Compensation Act in favor of appellee John T. Clark has been finally adjudicated and can no longer be the basis of further obligations on the part of appellants. (See pp. 54-55, supra). Private Act No. 445 in effect attempts to create a new cause of action in favor of appellee John T. Clark and thereby deprives appellants of their property without due process of law. To past transactions it retroactively attempts to attach obligations new and different from the liabilities which arose under then existing law.

It is recognized that the *mere* retrospective operation of a statute in and of itself affords no basis for invalidat-

ing the enacement.[27] The retroactive operation of this statute which must be condemned is its attempt to foist upon prior transactions new liabilities and new obligations. It has been repeatedly held that such retroactive legislation is invalid as a deprivation of property rights without due process of law. *Webster v. Cooper*, 14 How. 488, 14 L. ed. 510 (U. S. 1853); *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93 (1896); *Bradley v. Lightcap*, 195 U. S. 1, 49 L. ed. 65 (1904); *Ettor v. Tacoma*, 228 U. S. 148, 57 L. ed. 773 (1913); *Ochoa v. Hernandez Y Morales*, 230 U. S. 139, 57 L. ed. 1427 (1913). See also *Dash v. Van Kleek*, 7 Johns. 477 (N. Y. 1811, Kent, C. J. at 500). Nor can property rights vested under existing statutes be destroyed by a subsequent repeal thereof. *U. S. v. Kendall*, 263 Fed. 126 (D. C. La., 1920); *Arnold & Murdock Co. v. Industrial Comm.*, 145 N. E. 342 (Ill. 1924); *Dow v. Norris*, 4 N. H. 16 (1827).

A further infirmity to be found in Private Act No. 445 is that it arbitrarily takes property from one private individual and gives it to another. *Missouri Pacific R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489 (1896); *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 79 L. ed. 1468 (1935). As is well stated in *Hudson Duncan & Co. v. Wallace*, 21 F. Supp. 295, 308 (D. C. Ore. 1937):

"The Fifth Amendment, by implication forbids

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[27] See the excellent analyses and discussion of this subject in Smith, "Retroactive Laws and Vested Rights" (1938), 2 Selected Essays on Constitutional Law 266; (1927), 5 Tex. L. Rev. 231; (1928), 6 id. 409; and Smead "The Rule Against Retroactive Legislation; a Basic Principle of Jurisprudence" (1936), 20 Minn. L. Rev. 775. See also Stimson, "Retroactive Application of Law—A Problem in Constitutional Law" (1939), 38 Mich. L. Rev. 30.

the taking even under the authority of Congress of the private property of one person and the giving of it to another."

5. Private Act No. 445 is an attempted usurpation by Congress of judicial functions.

Private Act No. 445 deprives appellants of property without due process of law in that it is judicial in nature and authorizes a readjudication of private property rights between individuals arising out of past transactions.

While it is recognized that the complexities of modern governmental problems have necessitated the rejection of many contentions that the activities of administrative boards have violated the principle of separation of powers, it nevertheless remains written that "the judicial power of the United States shall be vested in one Supreme Court, and in such other inferior Courts as the Congress may from time to time ordain and establish," *U. S. Constitution*, Art. 3, §1, "and this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism." *Springer v. Philippine Islands*, 277 U. S. 189, 201, 72 L. ed. 845, 849 (1928).

It has been repeatedly held that Congress possesses no judicial power, *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377 (1880), the nature of which power this court has well declared in the following language:

> "* * * A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes

existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.*** ." *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 53 L. ed. 150, 158 (1908).

The courts with unanimity have held that any attempt by the legislature to grant a new trial, rehearing or further determination in a cause which has proceeded to final adjudication under existing statutes is invalid as an attempted exercise of judicial power.[28]

In the leading early American case of *Merrill v. Sherburne*, 1 N. H. 199 (1818) it was held that the legislative grant of a new trial was thus invalid, the court stating:

> " * * * a marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules upon which, in connection with the constitution, those decisions should be founded. * * * In fine, the law is applied by the one, and made by the other. To do the first, therefore, to compare the claims of parties with the laws of the land before established, is, in its nature, a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is in its nature a legislative act; and if those rules interfere with the past or the present, and do not look wholly to the future, they violate the definition of a law, 'as a rule of civil conduct.' 1 Bl. Com. 44. Because no rule of conduct can, with consistency, operate upon what occurred before the rule itself was promulgated.
>
> " * * * As the legislature, then, in the act under consideration, adjudicated on a case which had already happened, and had been litigated between individuals, their proceedings must, on general principles, be deemed an exercise of judicial powers. * * *."

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[28]See note 24, supra, p. 46.

Similarly, in *Petition of Siblerud*, 182 N. W. 168, 169 (Minn. 1921), it has been recently held that an attempted authorization of a rehearing in a local improvement proceeding was ineffective, the court stating:

> " * * * Now, it is proposed to vacate the findings and conclusion, revive the proceeding after it has been conducted to a final determination, and bring it on for hearing de novo. This court has held that the Legislature has no power to grant a new trial or rehearing of a cause after it has been heard and determined on the merits. * * * But, when the states adopted their Constitutions, they separated the judicial from the legislative power and divided the government into three distinct departments, the legislative, the executive, and the judicial, and generally declared that no one of the departments should exercise any of the powers properly belonging to either of the others. Such is the constitutional provision in this state. Article 3, State Constitution. In states where the Legislature had theretofore exercised the power to grant new trials, the adoption of a constitution containing such a provision was uniformly held to put an end to the power. It is generally agreed that to vacate a judgment or order which a court had authority to enter involves the exercise of judicial power, and that legislative action cannot be made to retroact upon past controversies by compelling the courts to set aside their judgments or to grant new trials. * * *."

An analogous situation to the case at bar is considered n *Union School District No. 1 v. Foster Lumber Co.*, 286 Pac. 774, 775 (Okla. 1930), wherein the legislature had sought by a special act to authorize and direct the endition of a judgment in that particular case in favor of the plaintiff. This act was held to be unconstitutional, he court stating:

> "The special act offends that part of the Constitution (section 1 of article 4) which divides our government into three departments, legislative, executive and judicial. This legislative act seeks to invade judicial power, in that it attempts to adjudicate a particular case by prescribing a rule contrary to the general law. That cannot be done. * * *."

Similarly it has been recently recognized that the enactment by Congress of any such legislation would be invalid as an exercise of judicial power. In *Pocono Pines Hotels Co. v. United States*, 73 C. Cls. 447, 499 (1932) it is stated:[29]

> "It nowhere appears that any suggestion was advanced that in the enactment of such legislation with reference to a court other than this one it would be ought else than the exercise by Congress of judicial and not legislative power."

See also: *Casieri's case*, 190 N. E. 118 (Mass. 1934); *Roles Shingle Co. v. Bergerson*, 19 Pac. (2d) 94 (Ore. 1933).

In summary it is submitted that Private Act No. 445 is unconstitutional and deprives appellants of their property without due process of law in that it destroys the rights and obligations which had become fixed and final under a prior compensation order. Furthermore, this Private Act affects the substantive right of these appellants and is not merely remedial in its nature. Its effect is to affix liabilities for a cause of action which no longer exists between the parties or to foist upon past transactions new and different obligations from those which arose under existing law and as such is an invalid exercise by the Congress of judicial power.

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[29]See discussion of this case, supra, at pp. 39-41

POINT C:

ILLUSTRATIVE DECISIONS CONSTRUING SIMILAR STATE ACTS.

While Private Act No. 445 is the first attempt by Congress to enact legislation of this nature, various state legislatures have heretofore passed similar acts to accomplish a like purpose. It is gratifying to note that with complete uniformity the state courts have held such acts unconstitutional and void.

In *Riggs v. Lehigh Portland Cement Co.*, 131 N. E. 231, 232 (Ind. 1921), by subsequent amendment of the Workmen's Compensation Law, rights to compensation were provided, not existing at the time of death of an employee. In affirming the refusal of the Industrial Board to make a further award based on the amendment, the court said:

> "We are of the opinion that the rights of all concerned were fixed by the act under which the award was made, and may not be modified by subsequent legislation. * * *. To permit subsequent legislation to increase or diminish the compensation specified in awards would be to strike down vested rights. Then no one would be secure. The resulting uncertainty, distrust, and confusion would destroy the compensation plan itself. To give to the amendment the effect desired * * * would be to confer * * * a substantive right which she did not possess at the time of the injury and death of her father, and to impose on the employer a burden not imposed by the law at that time. * * *."

In *Casieri's case*, 190 N. E. 118, 120 (Mass. 1934), involving the Workmen's Compensation Act of Massachusetts, a final order was entered by the reviewing board on November 10, 1928, terminating compensation

for disability as of December, 1927, on the ground that disability had ceased; thereafter, and pursuant to an amendment of the act adopted in 1932, removing the finality of such order, on petition of the employee further compensation was ordered which was affirmed by the superior court. On appeal of the insurer, the order for further compensation was reversed, the court stating:

> "Broad as is the power of the Legislature, it cannot reopen a decision once made as final according to existing law by a judicial tribunal or a quasi judicial board in the exercise of judicial functions so far as it affects private rights of property. Although the Industrial Accident Board is an administrative tribunal and not a court, its decisions partake of the nature of a court's decisions in their effect upon private property rights. * * * The decision of the board that all disability was at an end in December of 1927, was a final decision amounting to a judgment in favor of the insurer. * * * Such a judgment is property. * * *. It cannot, constitutionally, be taken away without compensation. * * * St. 1929, c. 246, by its terms as amended by St. 1932, c. 117, takes away that property. Moreover, inasmuch as a decree of a court might have issued on the board's decision, we think the principle applicable that a Legislature cannot grant a review or rehearing of the judgment or decree of a court where none is provided at the time of the decision.
>
> "In speaking of a statute which declared to be superseded a decree of this court confirming a report in a grade crossing proceeding, the justices said: 'The final decree * * * was a judgment of the court. The legislature cannot exercise judicial powers. * * * Any legislative attempt to that end would be a nullity. Manifestly it is the exercise of judicial power to grant a new trial or a rehearing in a cause in the courts, or to declare ineffective, or to reverse, annul, change, modify or affect the judgment of a court.' * * *.

"* * * The statutes questioned pass beyond the line of legislation with regard to procedure, and, so far as retroactive, must be held to be inoperative. * * *.

"* * * the decree must be reversed. It is in violation of the Fourteenth Amendment to the Constitution of the United States * * *."

In *Decker v. Powailsmith Corporation*, 168 N. E. 442, 443 (N. Y. 1929), the court, in referring to a similar private act for the relief of an employee whose claim was barred under the Workmen's Compensation Law, speaking through Judge Pound, Cardozo, C. J. concurring, stated:

"Chapter 709, Laws of 1927, is a special or private act for the relief of claimant, intended to revive his claim. It denies to the employer the equal protection of the laws by singling out one of a class for special burdens and obligations. One person should not be subjected to liability from which all others in like circumstances are exempted."

In *Roles Shingle Co. v. Bergerson*, 19 Pac. (2d) 94, 95, 96 (Ore. 1933), a sister of a deceased employee filed claim for compensation with the State Industrial Accident Commission, which claim was denied; on appeal the circuit court reversed, and on further appeal the decision of the circuit court was reversed, as the appeal to that court had not been taken within the time provided by law. Thereafter the legislature passed an act providing as follows:

"That the state industrial accident commission of the State of Oregon be and it hereby is authorized and directed to reopen the case and claim of said Bertha Bergerson for compensation, and to give a full hearing upon the merits thereof, and upon or

after such hearing to make a final order therein, with the right of appeal of said Bertha Bergerson to the courts from such final order, in accordance with the provisions of the workmen's compensation act."

Thereupon a contributor to the Industrial Accident Fund brought the action to have the act declared unconstitutional and to enjoin the State Industrial Accident Commission from further proceeding. In sustaining a decree in favor of the contributor, the court said:

"There are other serious constitutional objections to chapter 69 of the Laws of 1931, above quoted.

" 'Since the legislature does not possess and may not assume the exercise of judicial power, it cannot interfere in any way with pending judicial controversies. Therefore the legislature cannot annul or set aside the final judgment of a court of competent jurisdiction, or take particular cases out of a settled course of judicial proceedings, or grant a rehearing or appeal after the parties to a final judgment have lost the right to any further hearing, or set aside the judgments of courts, or revive judgments which have expired, or grant new trials, or order the discharge of offenders, or require that a certain deposition shall be read in the trial of a cause then pending, or provide for the sale of a decedent's land without notice to the heirs, and for the application of the proceeds to certain claims, or direct the steps which shall be taken in the progress of a judicial inquiry. The result of any other rule would be seriously to interfere with the discretion and independence of the judiciary.' 6 R. C. L., §163, p. 162.

"The decisions are almost unanimous in support of the text.

"Such legislation is repugnant to the principles of 'checks and balances' on which the governments of the state and nation are founded. Macartney v.

Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257.

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Constitution of Oregon, Article 1, §20.

"This section of the Constitution has been before the court many times and in many different phases, but the reasoning and logic of all the decisions are against the validity of such legislation. The Law of 1931, herein complained of, attempts to confer the special privilege upon the appellant to have her claim adjudicated in a way not given to any other litigant.

"If the Legislature has authority to pass such an act regarding individual claims against the State Industrial Accident Commission, would it not have the same right in regard to any other litigation before the courts?"

In *State v. Industrial Accident Board*, 23 Pac. (2d) 253, 256 (Mont. 1933), an original proceeding for prohibition was instituted. It was held that a special act authorizing an employee to present and prosecute a claim theretofore barred under the Woakmen's Compensatoin Act was unconstitutional, and the writ issued, the court stating:

"It applies by its very terms to but one individual and leaves all others in the same circumstances subject to the provisions of the general statute. It likewise renders some employers subject to compensation suits, previously barred by the statutes, without imposing a like burden upon others of the same class."

See also: *Casparis v. Fidelity Union Co.*, 65 S. W. (2d) 404 (Tex. 1933).

The foregoing decisions require no comment. A careful research has failed to reveal any reported state or federal decision upholding or validating an act similar to Private Act No. 445.

CONCLUSION.

It is respectfully submitted that Private Act No. 445 is violative of the "due process" clause of the Fifth Amendment to the Constitution of the United States and that the compensation order and award of March 13, 1939, made under the purported authority of said Private Act is therefore void, and it is respectfully prayed that this Court reverse the decree appealed from, declare said Private Act No. 445 unconstitutional and said compensation order void, and direct the District Court to enter a permanent injunction as prayed for.

Respectfully submitted,

STANLEY B. LONG,
EDWARD G. DOBRIN,
Counsel for Appellants.

BOGLE, BOGLE & GATES,
of Counsel.

APPENDIX

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DISTRICT COURT'S DECISION
27 F. Supp. 823 (Adv. Op.)

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

In Admiralty Nos. 47 and 48

PARAMINO LUMBER COMPANY, a corporation, and UNION INSURANCE SOCIETY OF CANTON, LTD., a corporation, Libelants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and JOHN T. CLARK, Respondents.

Bogle, Bogle & Gates and Stanley Long, Seattle, Washington, Attorneys for Libelants.

J. Charles Dennis, United States Attorney, Seattle, Washington, Gerald Shucklin, Asst. United States Attorney, Seattle, Wash., Attorneys for Respondent Marshall.

Oscar A. Zabel, Seattle, Washington, Attorney for Respondent Clark.

Before Healy, Circuit Judge, and Cushman and Bowen, District Judges.

MEMORANDUM OPINION—Filed May 10, 1939

Some of the historical background of these cases may be found in the decisions of the District Court, 18 F. Supp. 645, and of the Ninth Circuit Court of Appeals, 95 F. (2nd) 203.

These are two consolidated suits in admiralty before this 3-judge court, convoked pursuant to 28 U. S. C. A., Sec. 380a, brought by libelants employer and insurance carrier against respondents Deputy Commissioner and John T. Clark for temporary, interlocutory and permanent injunctive relief against Private Act No. 445

of the 74th Congress (H. R. 4439) for the relief of John T. Clark, and against a supplemental order and award of compensation of more than $4,000 made under that Private Act to Clark, a longshoreman, upon the alleged ground that the Private Act and award are illegal, unconstitutional and void, in that they (as Libelants allege) deny to libelants the equal protection of the laws and deprive them of their property without due process of law contrary to the Fifth and Fourteenth Amendments.

Cause No. 47 was commenced as an independent equity suit and Cause No. 48 was commenced as a suit for review by the District Court of the Deputy Commissioner's supplemental award. The causes have been consolidated and transferred to the admiralty side of the court. Both seek the same injunctive relief above noted. Respondents except to the libels on the ground that the libels do not state sufficient facts for the relief demanded. The sole question for decision is whether the Private Act is constitutional and a valid amendment to the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. A., Secs. 901, et seq.). Respondents contend that it is valid because it affects only the remedy and not the right of John T. Clark. Libelants insist that the Private Act is unconstitutional and void because the rights of the parties had been fixed by a previous binding award of compensation which cannot be changed by the effect of the Private Act giving as it does private relief only to Clark and to no else similarly situated.

The questioned Private Act of Congress provides as follows:

"An Act

For the Relief of John T. Clark, of Seattle, Washington.

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That, in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized

and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: Provided, that such new order shall not affect any compensation paid under authority of the prior order.

"Approved, April 10, 1936."

BOWEN, District Judge:

Much of what is stated in the following quotations was said with reference to state statutes, but the principles stated apply equally to Acts of Congress.

"A presumption in favor of constitutionality is raised by the mere fact of the enactment of a statute by the legislature; and the burden of showing that it is unconstitutional is on the party asserting it. * * *" 12 C. J. 791-794. "As to the degree and extent of this presumption, the rule, as variously stated, is that every reasonable presumption will be made in favor of the validity of a statute; * * * and also that doubt, a fair doubt, a serious doubt, any, and all, doubts, and every reasonable doubt as to the constitutionality of a statute will be resolved in favor of its validity; * * *." 12 C. J. 794-795. " * * * Other statements are that, where doubt exists whether there is a conflict between the statute and the constitution, the statute must prevail, and that the statute must be upheld unless its invalidity appears beyond all doubt, * * *." 12 C. J. 798.

In Williams vs. Norris, 25 U. S. 72, (12 Wheat. 117), one question was which one of two persons had the paramount title in certain lands. Norris claimed that his title was perfected by proceedings under a statute of the state of Tennessee entitled "an act for the relief of Ezekiel Norris," which provided; "Be it enacted," etc., that the commissioner of West Tennessee be, and he is hereby authorized to issue to Ezekiel Norris, certificates or warrants to the amount of 2,280 acres, being the amount of two entries, No. 2,046 for 1,000 acres and

No. 2,047 for 1,280 acres, on which no warrants or grants were issued; provided, that the said Ezekiel Norris shall produce sufficient evidence to the said commissioner that the consideration for said entries was paid, and that no warrant or grant ever issued on said entries."

Williams contended that statute was unconstitutional, but the court overruled that contention and at pages 80-81 (12 Wheat. 127-128) by Marshall, C. J., said: "What difference is there, so far as respects its constitutionality, between the act passed in his (Norris') particular case, and the act containing a general reference of all cases of the same description to the commissioner? * * *. There are, undoubtedly, great and solid objections to legislation for particular cases. But these objections do not necessarily make such legislation repugnant to the constitution of the United States."

That old case of Williams v. Norris, supra, decided in 1827, may be somewhat involved on the facts, but it is clear that in that case Chief Justice Marshall overruled the constitutional objection to a private act of a state legislature for the perfection of one man's title to land against the adverse claims of another man, and held in effect that the fact that legislation is for the private relief of one man in his relationship with another does "not necessarily make such legislation repugnant to the contitution of the United States." Counsel have not cited and the writer of this opinion is not advised of any later Supreme Court case overruling that judgment of Marshall. That situation, until unmistakably cleared up by later Supreme Court decision, renders this three-judge District Court unable to rule without doubt that the Private Act of Congress for the relief of John T. Clark here assailed is unconstitutional. Since its invalidity is not so free from doubt as to overcome the presumption of its validity, the Private Act must be upheld by this court.

The exceptions to the libels will be sustained. An order or orders carrying the foregoing ruling into effect may be settled upon notice or stipulation.

——— ———, Circuit Judge; Edward E. Cushman, District Judge; John C. Bowen, District Judge.

IN UNITED STATES DISTRICT COURT
In Admiralty Nos. 47 and 48
(Title omitted)

DISSENTING OPINION—Filed May 10, 1939

HEALY, Circuit Judge, dissenting:

I regret my inability to agree with my associates, but the invalidity of the private act does not seem to me doubtful.

The beneficiary of the act, Clark, was injured in January, 1931, while in the employ of the libellant Paramino Lumber Company. A claim for compensation was filed by Clark. Upon hearing before the deputy commissioner in August, 1931, an award of compensation was made in which it was determined that the claimant had been wholly disabled from the time of the injury to July 5, 1931, but had recovered from his injury and disability on the latter date. The employer and the insurance carrier paid compensation for the period of disability, pursuant to the order. Under the terms of the Longshoremen's Act (Sec. 21 (a); 33 U. S. C. A., Sec. 921 (a)) the compensation order became final at the expiration of thirty days thereafter, there having been no proceeding to suspend or set it aside.

So far as material here, Sec. 22 of the Longshoremen's Act, in effect then as now, provides that upon his own initiative, or upon the application of any party in interest, on the ground of a change in condition or because of mistake in a determination of fact, the deputy commissioner may review a compensation case, at any time prior to one year after the date of the last payment of compensation, and may issue a new compensation order continuing, reinstating or increasing compensation. No review was had of the case as permitted by this provision. On April 10, 1936, Congress passed the private act in question. The original order confessedly involved no fraud, and it is conceded that the award now sought to be enjoined was made solely under authority of the special act.

There are doubtless many instances in which injured longshoremen have found themselves in the unfortunate plight of Mr. Clark. Compare, for example, the facts in Kobilkin v. Pillsbury, 9 Cir., 103 F. (2d) 667. I cannot but believe that the private act, singling out as it does the libellants for the imposition of a burden not imposed by Congress on others in like situation, impinges on their constitutional rights guaranteed by the due process clause of the Fifth Amendment. The arbitary nature of the act is unrelieved by any asserted distinction which might serve to differentiate the obligation of these parties from that of other employers or insurance carriers in like circumstances. What Congress has done is to authorize an award of money for the relief of a private individual, payable not out of the public treasury, but out of the pockets of other private parties guilty of no fault. The statute involved in Williams v. Norris, 25 U. S. 72, appears to have been purely remedial, and I see nothing in that decision which would support this legislation.

I think the statute is invalid on grounds apart from the frailities just discussed. It purports to extend or remove the time limits imposed by Secs. 21 and 22 of the Longshoremen's Act, and is applicable only in a case where these time limits had already expired. In Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U. S. 633, the court dealt with a parallel situation. It was there pointed out that the Interstate Commerce Act created a cause of action against the carrier (in that case the right to damages for misrouting) and at the same time operated as a limitation upon liability. It was held that in the case of such statutory causes of action the lapse of the time limit not only bars the remedy but destroys the liability; and to give the statute a retroactive effect would be to deprive the carrier of its property without due process of law in contravention of the Fifth Amendment.

Similarly, the Longshoremen's Act (Sec. 4) creates a cause of action for compensation, irrespective of fault. It also limits the time within which an award of additional compensation may be made by the deputy com-

nissioner. This period had expired prior to the enact-
nent of the private act here in question. As of the latter
late liability no longer existed. Thus the act not only
upplies a remedy but necessarily imports the creation
f a new liability.

It would seem that the principle of the Danzer case is
equally applicable to general and to private statutes,
however free from other infirmities the latter may be.

I think the restraining order heretofore granted should
e made permanent.

Wm. Healy, U. S. Circuit Judge.

COMPENSATION ORDER AND AWARD OF AUGUST 26, 1931

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, FOURTEENTH COMPENSATION DISTRICT

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act

JOHN T. CLARK, Claimant,

against

SS. "DOROTHY WINTERMOTE" and/or PARAMINO LUMBER COMPANY, Employer, Union Insurance Society of Canton, Ltd., Insurance Carrier

Compensation Order, Award of Compensation, Case No. 104-19

Such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following Finding of Fact:

That on the 17th day of January, 1931, the claimant above named was in the employ of the employer above named at Seattle, in the State of Washington in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Union Insurance Society of Canton, Ltd.; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman on board the steamship "Dorothy Wintermote," said steamship being then afloat at Seattle, in the State of Washington; that while the claimant above named was so employed, he slipped and fell against a pile of lumber, sustaining a fracture of the 10th rib on the left side, and resulting in his disability; that notice of injury was given within thirty

days after the date of such injury to Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc in accordance with section 7 (a) of the said Act, that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $900.00; that as the result of the injury sustained the claimant was wholly disabled from January 17, 1931, to and including July 4, 1931, and he is entitled to 24-1/7 weeks' compensation, $11.54 per week, for such disability; that the claimant had recovered from his injury on July 5, 1931; that the employer has paid $331.20 to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following award:

That the employer, SS. "Dorothy Wintermote" and/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd., shall pay to the claimant compensation as follows: $278.61; that the employer shall have credit on this Award for $331.20 previously paid to the claimant as compensation.

Given under my hand at Seattle, Washington, this 26th day of August, 1931.

(S.) Wm. A. Marshall, Deputy Commissioner,
Fourteenth Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the Claimant the Employer, and the Insurance Carrier at the last known address of each as follows:

Mr. John T. Clark, 808—7th Ave., Seattle, Washington.

SS. "Dorothy Wintermote" and/or Paramino Lumber Co., No. 1 Drumm Street, San Francisco, California.

Union Insurance Society of Canton, Ltd., 1425 Dexter Horton Bldg., Seattle, Washington, care Mr. Pelly.

Mr. Samuel B. Bassett, 511 Alaska Bldg., Seattle, Washington.

Mailed August 26, 1931.

(S.) Wm. A. Marshall, Deputy Commissioner.

COMPENSATION ORDER AND AWARD OF MARCH 13, 1939

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
FOURTEENTH COMPENSATION DISTRICT

Case No. 104-19

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act.

JOHN T. CLARK, Claimant

against

SS. "DOROTHY WINTERMOTE" and/or PARAMINO LUMBER COMPANY, Employer, Union Insurance Society of Canton, Ltd., Insurance Carrier.

COMPENSATION ORDER, AWARD OF COMPENSATION

By authority of the provisions contained in Private Act No. 445, 74th Congress, approved April 10, 1936, hearings were held by the Deputy Commissioner on November 22, 1938, and on January 5, 1939, and the Deputy Commissioner having been authorized by the United States Employees' Compensation Commission to make findings of fact and an order and award of compensation, and such an order or award of compensation as may be indicated by such findings,

The Deputy Commissioner makes the following Findings of Fact:

That on the 17th day of January, 1931, the claimant above named was in the employ of the employer above named at Seattle, in the State of Washington in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and the liability of the employer for compensation under said Act was insured by the Union Insurance Society of Canton, Ltd.; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while

he was employed as a longshoreman on board the steamship "Dorothy Wintermote," said steamship being then afloat at Seattle, in the State of Washington; that while the claimant above named was so employed he slipped and fell against a pile of lumber, sustaining a fracture of the 10th rib on the left side, and resulting in his disability; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $900.00; that as the result of the injury sustained the claimant was wholly disabled from January 17, 1931, to and including January 5, 1939, and he is entitled to 415-6/7 weeks' compensation at $11.54 per week for such disability and amounting to the sum of $4,798.99; that the total disability of the claimant continued at the time of the hearing on January 5, 1939; that the employer has paid $331.20 to the claimant as compensation; that Oscar A. Zabel, attorney, has rendered legal services to claimant of the reasonable value of $200.00 and he is entitled to a lien on compensation due claimant therefor. Upon the foregoing facts the Deputy Commissioner makes the following Award:

That the employer, SS. "Dorothy Wintermote" and/or Paramino Lumber Company, and the insurance carrier, Union Insurance Society of Canton, Ltd., shall pay to the claimant compensation as follows: 415-6/7 weeks' compensation at $11.54 per week covering the period from January 17, 1931, to and including January 5, 1939, and amounting to the sum of $4,798.99, less $200.00 to be deducted therefrom and paid Oscar A. Zabel as his attorney; that the employer shall have credit on this award for $331.20 previously paid to the claimant as compensation; that subsequent to January 5, 1939, the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of $11.54 per week; that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treat-

ment as may be appropriate to the further treatment and cure of his disability.

Given under my hand at Seattle, Washington, this 13th day of March, 1939.

(Signed) Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer and the insurance carrier, at the last known address of each as follows:

Mr. John T. Clark, 220-9th Ave., Seattle, Wn.

SS. "Dorothy Wintermote" and/or Paramino Lumber Co., No. 1 Drumm St., San Francisco, Cal. Union Ins. Society of Canton, Ltd., Care Bogle, Bogle & Gates, Central Bldg., Seattle, Wn.

Oscar A Zabel, Atty., 4th and Pike Bldg., Seattle, Wn.

(Signed) Wm. A. Marshall, Deputy Commissioner.
Mailed March 13, 1939.

REPORT OF SENATE COMMITTEE ON CLAIMS (PRIVATE ACT 445)

74TH CONGRESS
2d Session

SENATE

CALENDAR No. 1711
REPORT
No. 1645

JOHN T. CLARK

FEBRUARY 24 (calendar day, MAR. 5), 1936.—Ordered to be printed.

MR. SCHWELLENBACH, from the Committee on Claims, submitted the following

REPORT

(To accompany H. R. 4439)

The Committee on Claims, to whom was referred the bill (H. R. 4439) for the relief of John T. Clark, of Seattle, Wash., having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

The facts are fully set forth in House Report No. 1892, Seventy-fourth Congress, first session, which is appended hereto and made a part of this report.

(H. Rept. No. 1892, 74th Cong., 1st sess.)

The Committee on Claims, to whom was referred the bill (H. R. 4439) for the relief of John T. Clark, of Seattle, Wash., having considered the same, report thereon with the recommendation that it do pass with the following amendment:

Strike out all of the bill after the enacting clause and insert in lieu thereof the following:

"That, in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of

March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of claims in section 19 of the said Act, and in accordance with such section to issue a new compensation order which may terminate continue, increase, or decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: *Provided*, That such new order shall not affect any compensation paid under authority of the prior order."

STATEMENT OF FACTS

As amended, this bill will authorize the Employees' Compensation Commission to reopen the case of John T. Clark, of Seattle, Wash. In order that the purpose of this bill may be understood, it becomes necessary to briefly discuss the Longshoremen's and Harbor Workers' Compensation Act. Said act places the liability for injuries sustained by longshoremen and harbor workers upon the employer, who in turn may insure his risk. The administration of the act was placed in the hands of the Employees' Compensation Commission, and local administration is accomplished through deputy commissioners, who have power to hold hearings and make final orders of compensation. Section 19, subsection c, states:

"The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, * * *."

And in the same section, subsection h, it is stated:

"An injured employee claiming or entitled to compensation shall submit to such physical examination by medical officer of the United States or by a duly qualified physician designated or approved by the Commission as the deputy commissioner may require."

The facts in this case disclose that on January 17, 1931, John T. Clark while employed as a longshoreman on the steamship *Dorothy Wintermote* at Seattle was

going from one hatch to another when he slipped in going over the cargo and fell against a pile of lumber. As is shown in the later testimony of three physicians, he sustained a fracture of the eleventh rib about 3 inches from the front end. Clark was employed by the Paramino Lumber Co., and employers' compensation insurance was carried by the Union Insurance Co., of Canton, Ltd.

Within 30 days the employer and the deputy commissioner of the Employees' Compensation Commission were notified of the injury, as required by said act, and the employee Clark was sent to the company's physician, Dr. Edmund H. Smith. The employee claims malpractice by Dr. Smith in that the injured eleventh rib was not treated, but instead, the physician, after some preliminary treatments, removed a part of the twelfth rib and discharged Clark while he was apparently still suffering from the original injury. The operation took place on May 12, 1931. Dr. Smith testified that he examined the eleventh rib and found a good union, but as compared with testimony submitted by other physicians, the same does not appear to be a fact. Following are affidavits by two physicians on this point.

MARCH 8, 1935.

RE: JOHN T. CLARK

To whom it may concern:

Mr. Clark came under my care July 12, 1931, for treatment of an injury received while employed by the McCormick Steamship Co. as a stevedore on the steamship *Dorothy Wintermote.*

May 12, 1931, the tip of the twelfth rib was removed by Dr. E. H. Smith. That patient still complained of pain in his left side and was unable to return to his former duties.

X-rays by Dr. J. T. Dawson, July 1931, disclosed a fracture of the eleventh rib, left side, slightly posterior to the axillary border, with the distal fracture displaced slightly upward and backward.

He has been totally incapacitated since the date of

the accident. His condition due to the un-united eleventh rib, can be corrected only by a surgical operation.

Yours truly,

U. C. BATES, M. D.

MARCH 8, 1935.

CLARK, MR. JOHN T., REPORT

This man gives a history of an injury to the lower chest on January 17, 1931. He sustained facture of the eleventh rib, about 3 inches from the anterior end.

On May 12, 1931, an operation was performed by his attending surgeon, and the tip of the twelfth rib was removed. This operation gave him no relief, so on November 30, 1931, I operated on the eleventh rib to fuse the fragments of this broken rib together.

The rib healed following the operation, but he has continued to complain of pain in this region.

H. J. WYCKOFF.

Name: Clark, John T. Date: July 13, 1931.
Case: Ribs.
Referred by Dr. U. C. Bates.

X-ray findings: Antero-posterior and semilateral plates show a fracture of the 11th rib, left side, slightly posterior to the axillary border, with the distal fracture displaced slightly upward and backward. No callous is noted.

Plates also show extensive hypertrophic arthritis of the spine.

J. T. DAWSON, M. D.

The employer started payment of compensation in installments from the date of injury and these continued until July 4, 1931, at the rate of $13.80 per week, amounting in all to $331.20. A little over a month after Dr. Smith performed his operation, that is, on June 18, 1931.

e claimed his patient had completely recovered. The mployer stopped paying compensation. The claimant rotested to the Deputy Commissioner at Seattle, Mr. Villiam A. Marshall, and the latter ordered a hearing n August 4, 1931. At this hearing the Deputy Commissioner found that the claimant had recovered from is injury as of July 5, 1931, apparently as the result of Dr. Smith's testimony, and he terminated the claimant's ompensation as of that date.

It is to be noted that under the said act, the Deputy ommissioner occupies a position of peculiar responsibility. He is neither the agent of the employer nor the mployee, but is an agent of the Government to protect he rights of both parties, and as such, he should exercise pecial care in his decisions.

The original act in section 22 provided that on the round of a change in conditions or because of a mistake n a determination of fact by the deputy commissioner, compensation case might be reviewed and a new compensation order issued. This right was made subject to time limit, as follows:

"Any time during the term of an award and after the ompensation order in respect of such award has become inal."

The Employees' Compensation Commission states that his provision has been interpreted by the courts as uthorizing such review only upon application made during the term of an award and not beyond such term.

In this case the deputy commissioner terminated the ompensation award as of a date prior to the final compensation order. Consequently, the claimant had no pportunity to apply for a review of the case. His only emedy, if remedy it can be called, would be within 30 lays of the Commissioner's order to appeal to the district court. The court decisions consistently hold in uch cases that the court will not assume jurisdiction to ry factual questions; the court's sole function is said o be to decide whether the Commissioner's action is in ccordance with law, and the law in this case has vested inal decision on the facts in the deputy commissioner.

Now, as heretofore stated, the law impliedly requires a physical examination by a medical officer of the United States, or by duly qualified physicians selected by the deputy commissioner. As a matter of fact, all that the commissioner did was to take the word of the doctor paid by the employer company. After repeated protests by the injured employee, the deputy commissioner, according to his own statement, called in no other physician except an orthopedist. The name of this doctor is not stated in a letter submitted by the deputy commissioner and there is no other record of such an examination.

Your committee is frank to admit that it has had no other cases of this kind, and that, as stated by the Employees' Compensation Commission, a private act of this nature might be successfully attacked by the employer or the insurance company in the courts. However, evidence of the claimant's present and past continuing disability is given by physicians and others, and it appears that the claim of malpractice by the company physician and of lack of due care of the claimant's interests by the deputy commissioner has been sustained. It is clear that Clark is at the present time hopelessly crippled and without compensation as a result of the foregoing, and we can see no objection to this bill, as amended, which gives the permission and authority of Congress for a review of the case by the Employees' Compensation Commission, the body charged with the administration of the Longshoremen's and Harbor Worker's Act.

There is appended hereto letters from the Employees' Compensation Commission.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION.

Washington, March 23, 1935.

CHAIRMAN, COMMITTEE ON CLAIMS,

House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: The Commission has received your request for its report upon the bill (H. R. 4439)

for the relief of John T. Clark, of Seattle, Wash. The bill provides: "That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury of the United States not otherwise appropriated, to John T. Clark, of Seattle, Wash., the sum of $5,000, being full compensation for disability resulting from injuries received by him as a longshoreman subject to the Longshoremen's and Harbor Workers' Compensation Act, such disability, however, being directly due to faulty diagnosis and improper treatment by the attending physician, and the failure of the deputy commissioner to provide examination by a competent and impartial physician, as provided by law."

The records of the Commission show that John T. Clark sustained an injury on January 17, 1931, while performing service for his employer, the Paramino Lumber Co., owner of the steamship *Dorothy Wintermote*, on which he was working at the time. Claim for compensation was filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (33 U. S. C., ch. 18, sec. 901 et. seq.), which is administered by this Commission through deputy commissioners in the several compensation districts established by it throughout the United States. The injury in the present case arose in the fourteenth compensation district under the jurisdiction of Deputy Commissioner William A. Marshall, whose office is located at Seattle, Wash.

The injury as reported by the employer was sustained when the employee "slipped and fell against pile of lumber," resulting, as stated by the employer, in a fracture of the tenth rib, although the medical testimony and medical reports in the case indicate that it was in fact the eleventh rib that had been fractured. Compensation was paid for said injury by the insurance carrier of the employer without an award, in accordance with the provisions of section 14 of the Longshoremen's Act, from the date of injury to July 4, 1931, 24 weeks' compcompensation at the rate of $13.80 per week, amounting to the sum of $331.20.

A hearing was held in this case before the deputy commissioner on August 4, 1931, as provided by section 19 of the Longshoremen's Act, upon the claim for compensation filed by Mr. Clark, on July 16, 1931, at which time the claimant was represented by counsel. On August 26, 1931, the deputy commissioner filed a compensation order, award of compensation, finding therein that the claimant was wholly disabled from the date of injury, January 17, 1931, to and including July 4, 1931, and that the claimant had recovered from his injury on July 5, 1931. A copy of the said compensation order awarding compensation for 24-1/7 weeks at the compensation rate of $11.54 per week is transmitted herewith for the fuller information of the committee.

It appears from the record in this case that the employer furnished the claimant with medical tre ment as required by section 7 (a) of the Longshoremen's Act. The employer's physician was Dr. Edmund H. Smith of Seattle, who performed an operation upon the claimant on May 12, 1931, at the Seattle General Hospital. This operation, as shown by the transcript of testimony taken at the hearing before the deputy commissioner, consisted of removal of the end of the twelfth rib, where pain had localized, and removal of scar tissue that had formed apparently from the tearing of the end of the cartilage of the rib. Dr. Smith testified at the hearing that at that time he investigated the site of the fracture of the eleventh rib and found there a good, firm, fibrous union.

The records of the deputy commissioner contains a medical report dated February 2, 1932 (after the jurisdiction of the deputy commissioner over the case had terminated), from Dr. H. J. Wyckoff of Seattle, showing that following the claimant's complaint of pain and disability he had, on November 30, 1931, performed an operation by removing small bone chips and placing them along the line of fracture of the eleventh rib, after freshening up the bone ends. The deputy commissioner advised the Commission that he did not have any knowledge of this operation until some months thereafter, and that according to his understanding the operation was performed through the local county hospital.

The medical and hospital treatment and care in this case, and the services of Dr. Edmund H. Smith, were furnished pursuant to the provisions of section 7 (a) of the Longshoremen's Act, which places the obligation to furnish such care and treatment directly upon the employer. The deputy commissioner under the law has no part in the selection of the employer's physician or surgeon, or authority over the nature of treatment to be furnished. The deputy commissioner did, however, under authority of section 7 (b) of the act, refer Mr. Clark to Dr. Roger Anderson, of Seattle, orthopedist, on July 7, 1931, for an impartial examination relative to the claimant's physicial condition; and the claimant was also examined by other physicians.

As stated above, the deputy commissioner found from the evidence taken at the hearing on August 4, 1931, including the report of the impartial physician, that the claimant had recovered from his injury on July 5, 1931, and incorporated a finding of fact to that effect in the compensation order filed on August 26, 1931. Had the claimant or counsel then representing him felt that the compensation order was "not in accordance with law," the claimant had the right, under section 21 of the Longshoremen's Act, to apply to the United States district court for the judicial district in which the injury occurred for a judicial review of the compensation order. This action apparently was not taken, although it appears from the deputy commissioner's file that Mr. Clark was represented in succession by several different attorneys.

At the time of the injury, and at the time final action was taken upon this case by the deputy commissioner, as well as when complaint of the surgical treatment administered was made to the deputy commissioner, the only provision authorizing the deputy commissioner to review a compensation order was that contained in section 22 of the Longshoremen's Act as originally passed. This section limited the power of the deputy commissioner to review a case to "any time during the term of an award and after the compensation order in respect to such award has become final." This provision has been inter-

preted by the courts as authorizing such review only upon application made during the term of an award, and not beyond such term.

This provision was obviously very restrictive, and probably has worked a hardship, by preventing review of a case by the deputy commissioner after the term of the award had expired, not only in Mr. Clark's case but in other cases as well, some of which have come to the Commission's attention. The Commission from time to time in its annual reports since the passage of the Longshoremen's Act suggested that Congress should amend the provisions of section 22 so as to enlarge the power of a deputy commissioner to review a case, but it was not until May 26, 1934, that section 22 was amended. Such amendment was not retroactive, however, and cannot be construed as applying to Mr. Clark's case. Moreover, the amendment contains a provision limiting the power to review a compensation order to "1 year after the date of the last payment of compensation."

As the last payment of compensation was made in 1931, the deputy commissioner was obviously without authority to reopen this case under the amended provision (even if such provision were retroactive) just as he had been without such authority when the need for such action was first urged upon him by and on behalf of Mr. Clark.

In connection with the declaration in the bill as to Mr. Clark's disability "being directly due to faulty diagnosis and improper treatment by the attending physician, and the failure of the Deputy Commissioner to provide examination by a competent and impartial physician as provided by law" (lines 10-14), the committee's attention is invited to the salient facts of this case as set forth above. Even if errors of judgment occurred on th part of the Deputy Commissioner, as well as on the part of the physicians and surgeons in the original handling of this case, as might be inferred from the complaints subsequently made, nothing in the case indicates that the Deputy Commissioner acted otherwise than honestly and conscientiously in the discharge of his official duty in connection with the case, and the Commission believes

that the severe stricture upon his official conduct as proposed in the bill is unwarranted.

The attention of the committee is further invited to the fact that even if the disability of Mr. Clark for which the bill proposes to grant relief is the result of a medical or surgical mistake or mistakes in the treatment of his injury, such treatment was not given by any physician or surgeon in the employ of the United States, but by those provided by the private employer of Mr. Clark whose duty it was under the law to provide such treatment, and possibly by others whose services were otherwise procured.

The proposed measure, if enacted, would authorize and direct the Secretary of the Treasury to pay to John T. Clark the sum of $5,000 as "full compensation for disability resulting from injuries received by him as a longshoreman subject to the Longshoremen's and Harbor Workers' Compensation Act," and apparently would impose no duty upon this Commission in connection with such payment. Nevertheless, and without going further into the case or undertaking here to develop fully the principles involved, the Commission feels compelled to point out to the committee that the assumption on the part of the United States (as this measure would assume, tacitly if not expressly) of responsibility for full relief to persons injured within the purview of the Longshoremen's and Harbor Workers' Compensation Act would set a precedent which might have far-reaching and grave consequences. The Commission feels constrained, therefore, in the public interest, to recommend against the passage of the bill H. R. 4439.

Very truly yours,

(Mrs.) JEWELL W. SWOFFORD, *Chairman.*

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,

Washington, August 1, 1935.

Hon. AMBROSE J. KENNEDY,
Chairman, Committee on Claims,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: I have received your letter of July 25, 1935, relative to the matter of the claim of John T. Clark, of Seattle, Wash., who sustained injury on January 17, 1931, while performing service for his employer, the Paramino Lumber Co., owner of the steamship *Dorothy Wintermote*, for whose relief the bill (H. R. 4439) was introduced, proposing to pay him $5,000 out of the Treasury of the United States, for the injuries sustained on January 17, 1931.

You transmit with your letter draft of a bill which has been offered as a substitute for the bill (H. R. 4439), and request an opinion from the Commission as to the effect of said draft should it become a bill and be enacted, and whether the Commission would have any objection to its enactment, or any suggestion as to its form. The draft contains the following:

"That, in the case of John T. Clark, of Seattle, Wash., whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of claims in section —— of the said act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase or decrease such compensation, the provisions of sections 21 and 22 of the said act, as amended to the contrary notwithstanding: *Provided*, That such new order shall not affect any compensation paid under authority of the prior order."

Under the proposed draft of bill this Commission would be authorized and directed to review the compensation order filed on August 26, 1931, by Deputy Commissioner William A. Marshall, of the fourteenth compensation

district, in Mr. Clark's case, in accordance with the section of the act prescribing the procedure in respect of claims, and to issue a new compensation order therein which may terminate, continue, increase, or decrease such compensation, notwithstanding the provisions of sections 21 and 22 of the Longshoremen's Act. This proposed measure, if enacted, would apparently have the effect of requiring the Commission to reopen Mr. Clark's case for the purpose of modification of the compensation order filed August 26, 1931, so far as the facts when determined upon such review would warrant such modification.

The Longshoremen's and Harbor Workers' Compensation Act affects private employers and employees, and compensation under the act is paid either by the employers, if self-insurers, or by authorized insurance carriers with whom the employers contract with respect to carrying their compensation liability under the act. No liability for the payment of compensation thereunder is imposed upon the United States. The deputy commissioner in the administration of the Longshoremen's Act performs quasi-judicial functions in determining the respective rights of the parties under the act. The adjudication of claims under the act vests a species of property rights in the interested parties which the Commission believes cannot be disturbed after they have become final and no longer subject to review as provided by the act.

The proposed measure, quoted above, would no doubt be open to objection on constitutional grounds, among other things because of its disciminatory nature, in that it would grant a special privilege not accorded equally to other employees under the act. It would also disturb vested rights. Similar State acts, so far as the Commission has noted, have uniformly been held unconstitutional or invalid, and in this connection the committee's attention is called to the following illustrative cases: *Casieri's case* (190 N. E. 118, Mass. 1934); and *Roles Shingle Company v. Bergerson* (19 Pac. (2d) 94, Oreg. 1933.

Aside from the fact that the draft of proposed bill would impose upon the Commission a function in this

particular case which is in the nature of a duty imposed under the Longshoremen's Act upon its deputy commissioners, the constitutional infirmity of the measure would leave little doubt that any order issued thereunder would be successfully attacked in court by the employer or insurance carrier. Accordingly, the Commission respectfully deprecates the submission of this draft as a substitute bill. No change in the language of this draft would seem to be possible which would obviate the underlying reasons against enactment of such a measure.

Very truly yours,

JEWELL W. SWOFFORD, *Chairman.*

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
Seattle, Wash., September 6, 1934.

Hon. M. A. ZIONCHECK,
Seattle, Wash.

DEAR SIR: This replies to your letter of September 3, 1934, relative to the case of Mr. John T. Clark, who sustained an injury on January 17, 1931, while employed as a longshoreman and while subject to the Longshoremen's and Harbor Workers' Compensation Act.

A controversy arose as to whether his disability had terminated on July 5, 1931, and a hearing was held on August 4, 1931, to determine the question at issue. The attending physician testified that the disability resulted from a fracture of the eleventh rib and that on May 12, 1931, he operated on the injured man because of persistent complaint of pain; that at time of operation he took off the end of the twelfth rib and also investigated the site of the eleventh rib, finding a good, firm, fibrous union and that he could not move the rib when he pressed on it as hard as he could. He also testified the injured man had recovered on June 18 and was able to resume his employment.

Previous to the hearing, I had an examination of Mr. Clark by an orthopedist and he also stated that in his opinion the injured man was able to resume his employment. A compensation order was accordingly filed on

August 26, 1931, finding that disability had ceased as of July 5, 1931.

No appeal was taken from the order filed, and Mr. Clark visited me from time to time and claimed that disability persisted. Ten months later I learned that he had an operation by Dr. H. J. Wyckoff on November 30, 1931, on the eleventh rib. This was long after my jurisdiction over the case had ceased.

Mr. Clark continued to visit me relative to his disability, and then in the summer of 1933 you took up this case with me and, notwithstanding I had no authority to take any formal action in the matter, I conferred with Dr. Bates and the specialist who had examined Mr. Clark for the county hospital, the purpose being to ascertain if any additional surgical care promised to improve the condition. I concluded that no additional operation was indicated and that the case had developed into one of neurosis.

Obviously, Mr. Clark is not a malingerer, or he would not have submitted to two operations and be willing to undergo an additional operation. His complaints of pain and disability have been so persistent that I was forced to conlude that as a result of all the circumstances he had become neurotic and the original injury is responsible for his condition.

I trust that I have given sufficient details, but will be pleased to furnish any additional information.

Yours truly,

WM. A. MARSHALL,
Deputy Commissioner, District No. 14.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
Washington, November 2, 1934.

Hon. M. A. ZIONCHECK,
Seattle, Wash.

MY DEAR CONGRESSMAN ZIONCHECK: I have received your letter of October 13, 1934, enclosing copies of correspondence, and copy of a statement made to you

by Mr. Clark, relative to the case of John T. Clark, former employee of the Paramino Lumber Co., who sustained injury on January 17, 1931, while performing service for his employer aboard the steamer *Dorothy Wintermote*. Your letter indicates that you believe the Commission should recommend to the Private Claims Committee of the House of Representatives favorable action upon a private relief bill, which I infer will be introduced by you, to provide relief for Mr. Clark by a grant of compensation or similar gratuity by the Federal Government.

Should such a bill be introduced and referred to it the Commission will make report thereon as requested. The Commission would not feel warranted otherwise in addressing the committee, nor would it feel justified in recommending a relief measure of this nature, for reasons which will appear below.

Deputy Commissioner Marshall in his letter of September 6, 1934, advised you of the essential facts upon which his action in Mr. Clark's case was taken. After the hearing held on August 4, 1931, referred to by the deputy commissioner, a compensation order was filed on August 26, 1931, containing among the findings of fact a finding that the employee had recovered from his injury on July 5, 1931. Mr. Clark was at that time represented by counsel. If Mr. Clark or his counsel had felt that the compensation order was "not in accordance with law," proceedings for judicial review of the compensation order as prescribed by section 21 (b) of the Longshoremen's Act, a copy of which is herewith enclosed for convenient reference, might have been instituted. Such proceedings, however, were not instituted and the order became final upon the expiration of the thirtieth day after it was filed by the deputy commissioner.

At the time of the injury and at the time final action was taken upon this case by the deputy commissioner the only provision authorizing the deputy commissioner to review a compensation order was that contained in section 22 of the act as originally passed. You will note that the power to review under section 22 was limited

with respect to time; namely, "at any time during the term of an award and after the compensation order in respect of such award has become final." This provision has been interpreted by the courts as authorizing such review only upon application made during the term of an award, and not beyond such term.

This provision was obviously very restrictive and probably has worked a hardship not only in Mr. Clark's case but in many other cases as well, some of which have come to the Commission's attention. The Commission has suggested in its annual reports since the passage of the act that Congress should amend the provision so as to enlarge the power of a deputy commissioner to review a case, and it was not until May 26, 1934, that section 22 was amended. A copy of the amendment is herewith enclosed for your information. It is not retroactive and cannot be construed as applying to Mr. Clark's case. Moreover, the amendment contains a provision limiting the power to review a compensation order to "one year after the date of the last payment of compensation."

I have carefully considered the suggestion in the last paragraph of your letter, but regret to have to advise you that, as above stated, I cannot see my way clear to make to the Committee on Claims such a recommendation as you suggest. The claimant in this case was not employed by the United States and did not sustain any injury as a result of any service for the United States or as a result of any negligence of an officer or agent of the United States, or as the result of any treatment by a physician employed by the United States. This case arose under the Longshoremen's Act which prescribes benefits to be provided by and on behalf of the private employer and imposes no obligation upon the United States. For this Commission to recommend additional relief by the United States in such a case because of inadequacy of the relief afforded under the Longshoremen's Act would establish a precedent which I do not feel that the Commission could justify. The theory in support of such private relief acts as have come to the attention of the Commission is understood to be that the recipient of the

proposed gratuity has been injured while in the employ of the Government or through the negligence of some officer or agent of the United States, and for some reason or another cannot be compensated under existing law. No case has come to my attention where the Government has by private relief act granted benefits or gratuity to a private employee of a private employer because of injuries sustained under such employment.

I have considered also the possibility of a measure designed to give the Deputy Commissioner continuing jurisdiction over Mr. Clark's case, but such measure would immediately be open to objection on constitutional grounds, among other things because of its discriminatory nature. Similar measures have been passed by State legislatures under workmen's compensation laws and have been nullified by the courts because of the obviously discriminatory nature of such legislation.

For the foregoing reasons I regret to advise you that it will not be possible for me or for the Commission to recommend a private relief act in the case of Mr. Clark.

Very truly yours,

HARRY BASSETT, *Commissioner.*

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 271

PARAMINO LUMBER COMPANY, a Corporation, and UNION INSURANCE SOCIETY OF CANTON, LTD., a Corporation, *Appellants*,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and JOHN T. CLARK, *Appellees*.

IN ADMIRALTY
(Consolidated Cases)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE JOHN T. CLARK

OSCAR A. ZABEL,
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Counsel for Appellee John T. Clark.
1001 4th & Pike Building,
Seattle, Washington.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 271

PARAMINO LUMBER COMPANY, a Corporation, and UNION INSURANCE SOCIETY OF CANTON, LTD., a Corporation, *Appellants*,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and JOHN T. CLARK, *Appellees*.

IN ADMIRALTY
(Consolidated Cases)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE JOHN T. CLARK

SUMMARY OF ARGUMENT

I. Motion to Dismiss for Want of Jurisdiction:

1. The case on the merits shows (a) that the workman suffered from malpractice by the appellants' physician so as to conceal the true condition of his

disability from both the workman and the Deputy Commissioner, resulting in the order of award of August 26, 1931; (b) that the workman did not act within the time for appeal or reopening during the term of award because he was thus misled; (c) that he did complain of his condition persistently after the order of August 26, 1931, and the Deputy Commissioner continued investigation into his case.

2. That the Deputy Commissioner actually exercised continuing jurisdiction over the workman's claim until the last award of March 13, 1939.

3. That a liberal construction of Section 22, of Federal Statute of March 4, 1927, Chapter 509 Laws of 1927, 44 Stat. 1437, requires a holding that under the facts here shown the award to the workman was proper and lawful because the terms of the act necessarily contemplate knowledge of the true facts by the workman before he can make application for reopening for change in his condition, and does not contemplate barring cause when the Deputy Commissioner continues to investigate the claim after his final order, at the instance of the workman.

4. That such a liberal construction of Section 22 supported by all available authority, precludes the necessity of passing on the validity of Act No. 445, which is assailed by appellants. The act becomes merely an effort to protect the workman under the mistaken apprehension that his rights were terminated.

II. Answer to Point A of Appellants' Brief.

1. There is a distinction sustained by competent authority between the Fourteenth Amendment and the Fifth Amendment. The former does not apply to congressional legislation and is not applicable to the act assailed.

2. The contention that Clark is accorded a special privilege over other employees is not sustained since the entire case shows an effort merely to allow him rights accruing from his original injury in accordance with the act providing compensation. In any event, appellants cannot suffer injury *to themselves* from such claimed discrimination and have no standing as complaining parties.

III. Answer to Point B of Appellants' Brief.

1. There was no right in appellants by reason of the order of August 26, 1931, upon which Congress could not legislate, since the subject matter of limitation of remedy is procedural and no substantive rights were affected, and (a) the policy favoring compensation to injured workmen transcends the policy for limiting time of remedy; (b) Clark's substantive rights are merely secured by the Act which extends the time; (c) the defense of statute of limitations does not create a vested substantive right in appellants; (d) but is a subject within the control of the law-making body.

2. Due process is accorded by the very terms of Act No. 445 and preservation of rights as to prior orders.

3. Under the weight of authority, the Act No. 445 is entitled to liberal construction as remedial legislation and to the presumption of validity. All doubts must be resolved in favor of its constitutionality.

ARGUMENT

MERITS OF THE CASE

"Courts will not anticipate a question of constitutional law in advance of the necessity of deciding it."

Paramino Lumber Co., et al., v. Wm. A. Marshall, et al., 95 Fed. (2d) 203, 206.

The award made to the appellee in this case should be sustained under the provisions of the Longshoremen's and Harbor Workers' Act, irrespective of the question of the constitutionality of the separate act here being assailed. It is only necessary to discuss the salient facts surrounding appellee's total disability as found by the Deputy Commissioner of the Employees' Compensation Commission charged with the administration of the Longshoremen's and Harbor Workers' Act to support this contention. Typical of appellants' brief in several instances, they have omitted from the Statement of the Case, commencing at page 5 of their brief, the important fact that the workman, Clark, at the time of the order of award on August 26, 1931, *was not aware* of the malpractice to which he had been subjected by appellants' physician, and was given to understand that his physical injuries had been properly treated. Claimant suffered a severe fracture of one rib and during the surgical operation a healthy and uninjured rib was

removed; that following the operation claimant was sewed up, and the fragmented, torn and damaged rib was permitted to remain in appellee's body. Thereafter an award was made to claimant based upon said medical treatment, closing his claim and subsequently, and after the time in which claimant could resort to the remedy of appeal from the commissioner's award, claimant was advised from independent x-rays taken, that he had, in fact, been given no treatment for the actual injuries sustained, but had in fact been more greatly injured by reason of the unnecessary operative treatment performed.

The commissioner, in his final award of March 13, 1939, found

> "That as a result of the injury sustained the claimant was wholly disabled from January 17, 1931, to and including January 5, 1939 * * * that the total disability of the claimant continued at the time of the hearing on January 5, 1939, * * * that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treatment as may be appropriate to the further treatment and cure of his disability." (R. 18)

Thus it can be seen that as a result of the injury, *claimant was totally disabled at the time of the first order of award and* that that *total disability has continued to this day* due to the malpractice of the company's physician and the dependence by the deputy commissioner upon the mistaken conclusion reached by the physician. At this juncture, it is well to refer to the Report of the Senate Committee on Claims,

Report No. 1645, Calendar No. 1711, 74th Congress—2nd Session (R. 5, 25), which in part states as follows:

> "However, evidence of the claimant's present and past continuing disability is given by physicians and others, and it appears that the claim of malpractice by the company physician and of lack of due care of the claimant's interests by the deputy commissioner has been sustained. It is clear that Clark is at the present time hopelessly crippled and without compensation as a result of the foregoing, and we can see no objection to this bill, as amended, which gives the permission and authority of Congress for a review of the case by the Employees' Compensation Commission, the body charged with the administration of the Longshoremen's and Harbor Workers' Act." (Appendix 13, 18, Appellants' Brief)

As disclosed by his letter of September 6, 1934 (Appendix 27, Appellants' Brief), the Deputy Commissioner, Wm. A. Marshall, District 14 of the United States Employees Compensation Commission, found that,

> "No appeal was taken from the order filed (Aug. 26, 1931), and Mr. Clark visited me from time to time and claimed that disability persisted. Ten months later I learned that he had an operation by Dr. H. T. Wyckoff on November 30, 1931, on the eleventh rib. This was long after my jurisdiction over the case had ceased."
>
> "Mr. Clark continued to visit me relative to his disability, and then in the summer of 1933 you (Congressman Zioncheck) took up this case with me and, notwithstanding I had no author-

ity to take any formal action in the matter, I conferred with Dr. Bates and the specialist who had examined Mr. Clark for the County Hospital, the *purpose being* to ascertain if any additional surgical care promised to improve the condition. I concluded that no additional operation was indicated and that the case had developed into one of neurosis."

"Obviously, Mr. Clark is not a malingerer, or he would not have submitted to two operations and be willing to undergo an additional operation. His complaints of pain and disability have been so persistent that I was forced to conclude that as a result of all the circumstances he had become neurotic and the *original injury* is responsible for his condition." (Parenthesis supplied)

Thus it is a fact that the Deputy Commissioner, in spite of his order of August 26, 1931 (R. 13), has not only been continuously informed by claimant of his total disability, but has actually from time to time in the furtherance and performance of his duties as deputy commissioner, interested himself in ascertaining what further medical treatment was necessary, and on November 22, 1938, commenced a hearing in accordance with all the rules and provisions of the Longshoremen's and Harbor Workers' Act, for the review of the previous award, and concluded said hearing on January 5, 1939, and on March 13, 1939, gave a further award of compensation because of claimant's continued total disability from January 17, 1931, to January 5, 1939 (R. 17).

In this further award the appellants were credited with all compensation previously paid claimant, and the further award was nothing more than the continuance of the compensation from the point where claimant was improperly cut off because of the malpractice involved. It is therefore evident that as a matter of right, the further award to claimant was nothing more than what claimant was at all times entitled to. It is also evident that the Deputy Commissioner maintained a continuing jurisdiction in claimant's case in the proper performance of his duty to award compensation to those workmen who are entitled to that relief under the Longshoremen's and Harbor Workers' Act.

In determining whether under the above facts, and irrespective of any statute passed in 1936 for his relief claimant is entitled to the compensation awarded for his continuing total disability under the Longshoremen's and Harbor Workers' Act of March 4, 1927, we must predicate our analysis upon the salutary principle that the original and primary legislation which brought into existence the Longshoremen's and Harbor Workers' Act, was and is essentially, basically and fundamentally remedial legislation. The law applicable to the Longshoremen's and Harbor Workers' Compensation Act is distinct in itself and the Federal Courts throughout the nation properly interpret said legislation liberally in favor of the longshoremen to effect its object to award compensation for actual disabilities, partial and total. Furthermore, a reasonable construction is placed

upon it to do justice and avoid wrong, and all doubts in connection with its administration are resolved in favor of the longshoreman.

The following cases support the sound principle of labor law that the Longshoremen's and Harbor Workers' Act must be *liberally construed in favor of the injured employee seeking compensation*, the law being remedial in character:

General Accident, Fire and Life Insurance Corp. v. Crowell, Dep. Comm., 76 Fed. (2d) 341;

Kropp v. Parker, Deputy Commissioner, 8 Fed. Supp. 290;

DeWald v. Baltimore & Ohio R. Co., 71 Fed. (2d) 810;

Southern Shipping Co. v. Lawson, 5 Fed. Supp. 321, 323;

Standard Accident Insurance Co. v. Hoage, 66 Fed. (2d) 275.

A claimant is entitled to liberal construction of the Longshoremen's Compensation Act and doubts should be resolved in his favor.

Southern S. S. Co. v. Norton, 101 Fed. (2d) 825;

Eastern S. S. Lines v. Monahan, Inc., 26 Fed. Supp. 944, 947.

In August, 1931, when the award was made to Clark the statute in force governing review of awards was Sec. 22, Chap. 509, Laws of 1927, 44 Stat. 1437, providing that

"Upon his own initiative, or upon application

of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in Section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."

This section was amended May 26, 1934, subsequent to the order of August, 1931, but essentially it is the same type of statute limiting the review to a specific period after the final order is extended. The more recent cases interpreting the amended provision are, however, strongly persuasive in determining the construction to be given to the original section in the light of the foregoing facts.

Such amended provision of the Longshoremen's and Harbor Workers' Compensation Act authorizing review of compensation cases for change in conditions or mistake in determination of facts is a remedial statute which must be liberally construed. *Bethlehem Shipbuilding Corp. v. Cardillo*, 102 Fed. (2nd) 299, affirming 23 Fed. Supp. 400. In the cited case claimant was injured under the old Longshoremen's and Harbor Workers' Act. Subsequently, an amendment was passed stating that within a year, on account of change in conditions or because of a mistake in the determination of fact by the deputy commissioner, he

may, at any time prior to one year after date of last payment of compensation, review a compensation case. The commissioner made an award thereafter (101 Fed. (2nd) 254) to the workman and the appellants claimed it was contrary to law since the workman was injured and award made to workman before passage of amendment and therefore did not apply to him. The commissioner, after hearing, found total disability. The Court stated:

> "Sec. 22, as amended, is a remedial statute and calls for liberal construction;"

In the above case Certiorari was denied. 59 S. Ct. 1042.

The above case also is reported in 23 Fed. Supp. 400, wherein the court cited *Independent Pier Co., et al. v. Norton, Dept. Com. D. C.*, 12 Fed. Supp. 974, *ante.*

In *Cardillo, Dep. Com., et al. vs. Liberty Mutual Insurance Co.*, U. S. Circuit Court of Appeals for the District of Columbia (1938), 101 Fed. (2nd) 254, 255, the following appears:

> "The same conclusion follows from the principle that compensation acts are to be 'construed liberally in furtherance of the purpose for which they were enacted.' *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U. S. 408, 414; 52 S. Ct. 187, 189; 76 L. Ed. 366."

Rothschild & Co., Inc., v. Marshall, D. C. Wash. 1930, 47 Fed. (2nd) 919, states:

> "The Longshoremen's and Harbor Workers'

> Compensation Act *is to be reasonably construed to effect its object to award compensation for actual disabilities, partial and total;* to that end the commissioner is authorized to hold as many hearings as conditions require (Sec. 22) * * * "And that reasonable construction to do justice and avoid wrong which all *ambiguous statutes, orders, judgments,* and decrees should have, if possible, should construe the direction to 'proceed accordingly' to intend that the Commissioner should take the only official action open to him, *viz*: Rehearing and an order 'in accordance with law.' *Doubts should be resolved in favor of the longshoreman rather than the insurer.*"

In *Crabb v. Department of Labor and Industries,* 186 Wash. 505; 58 Pac. (2nd) 1025, the workman filed claim for injured ankle and award was made and claim closed. No appeal was taken and no other claim filed within the one year limitation. After year expired claimant filed claim for injury to neck which developed but was traceable to original injuries. This was due to the fact that claimant had no way of knowing before the expiration of the statutory time that his injury to his neck would disable him. The Supreme Court of the State of Washington at page 512 held as follows:

> "Having in mind the well known spirit and purpose of our industrial insurance act, we feel impelled to adopt the liberal view announced by the Supreme Court of Oklahoma.
>
> "It follows the department should have entertained the claim."

The late Mr. Justice Butler, speaking for the Court

in *Baltimore & Philadelphia Steamboat Co., et al., v. Norton, Deputy Commissioner, et al.*, 48 Fed. (2nd) 57; 284 U. S. 408, at 414, said:

> "The measure before us (Longshoremen's and Harbor Workers' Act) like recent similar legislation in many states, requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results. *Jamison v. Encarnacion*, 281 U. S. 635, 640." (Parenthesis supplied)

Thus, it can be seen, and rightly so, that any portion of the remedial statute which is designed to cut off the rights of the workman, must necessarily be construed liberally, if the act is capable of being construed at all, in favor of the spirit and intent of the Longshoremen's and Harbor Workers' Act—namely, to award compensation to those entitled to same. In the instant case it is clear that if the workman knew of his injuries and was in no way misled to his detriment, the act will foreclose his attempt to reopen for further consideration. A construction, however, which protects workmen not aware of the character of their injuries and who by malpactice or

otherwise are misled as to the nature of their injuries, would be in harmony with the spirit and intent and principal aims of the entire compensation act, and yet not prohibited by the language of Sec. 22, Chapter 509 Laws of 1927, 44 Stat. 1437, or the amended Sec. 922 of Title 33 U.S.C.A. (52 Stat. 1167). The facts of the instant case are such as to justify a construction of the section excepting therefrom cases *where the workman is unaware of the nature of his injuries at the time of the award.* Such a construction is reasonably drawn from the language which reads that "upon application of any party in interest" the case may be reopened.

For it goes without saying that such application can only be made *with a knowledge of the facts* (at least to the extent that a layman may have them) of the "change in conditions" mentioned. Certainly the statute cannot apply when the facts show a continuing jurisdiction exercised by the Deputy Commissioner at the workman's request.

In the case of *Kropp v. Parker, Dep. Com'r., supra,* 8 Fed. Supp. 290, the Longshoremen's and Harbor Workers' Act was construed liberally in favor of the workman and compensation was awarded him even though the workman had not filed his claim within the statutory limitation period, the court stating in part in the syllabus as follows:

> "Claim for compensation under Longshoremen's and Harbor Workers' Act, held not barred by limitation where *neither employee nor em-*

ployer was aware of latent injury which was discovered June 3, 1933."

The court in the above case also reviews many decisions and concludes that the weight of authority is in harmony with the above reasonable construction, and states:

> "It is also clear that the Act should be liberally construed."

In the case of *Union Stevedoring Corp. and Liberty Mutual Insurance Co. v. Norton, Deputy Com'r.*, 98 Fed. (2d) 1012 (1938) the longshoreman was injured in 1929, and an award was made in 1931. About 5½ years after the injury and several years after the claim was considered closed, claimant

> "Filed an application with the deputy commissioner for further medical, surgical and hospital treatment *on account of his continuing injury.*"

The Deputy Commissioner, in part, found

> "That a condition causing pain and disability still exists resulting from the injury of December 8, 1929,"

and the deputy commissioner ordered

> "that the employer and insurance carrier furnish claimant with appropriate medical, surgical and other attendance or treatment for the relief of the condition from which the claimant is now suffering."

Various technical contentions were made by appellants and appellee, and the court, at page 1016, aptly disposed of these contentions as follows:

> "Further reference to the contentions of the respective parties would be fruitless. *It is our duty to construe the act liberally* and in such wise as to effect the purpose intended by Congress. *Baltimore & Phila. Steamboat Co. v. Norton*, 284 U. S. 408, 414; *Jamison v. Encarnacion*, 281 U. S. 635, 640.
>
> "The Longshoremen's and Harbor Workers' Act, 33 U.S.C.A., Sec. 901 *et seq.*, is intended to afford relief to persons who incur injuries in the course of that employment."

If the position of appellee is correct, then there is no constitutional question before this court for decision, and the appeal should be dismissed for want of jurisdiction of this court.

As was aptly stated by Justice Reed, speaking for the Court in the recent case of *Driscoll v. Edison Light and Power Co.*, Vol. 307 U. S. No. 1, page 104, Official Reports of the Supreme Court, at page 115:

> "This course observes the very salutary rule that 'this court will not decide an issue of constitutionality if the case may justly and reasonably be decided under a construction of the statute under which the act is clearly constitutional.'"

Citing

300 U. S. 55, 75 to 76;
275 U. S. 142, 148;
264 U. S. 298, 307;
258 U. S. 204, 217.

And, as stated by Chief Justice White, speaking for the Court in *Easterling Lumber Co. v. Pierce*, 235 U. S. 380, where

"The objection to the second statute is that it was wanting in due process because retroactively applied to the case, since the statute was enacted after the accident occurred. But the court below held that the statute cut off no substantive defense, but simply provided a rule of evidence controlling the burden of proof. That as thus construed it does not violate the 14th Amendment to the Constitution of the United States is also so conclusively settled as to again require nothing but a reference to the decided cases."

and further that

"It had been conclusively settled by the decisions of this court that both grounds relied upon were devoid of merit, we think the alleged constitutional questions were too frivolous to sustain jurisdiction and we therefore maintain the motion which has been made to dismiss, and our judgment will be: Dismissed for Want of Jurisdiction."

In view of the foregoing, motion is hereby made by the appellee for dismissal of appellants' appeal for want of jurisdiction.

ANSWER TO APPELLANTS' BRIEF

From a reading and study of appellants' brief, it is at once apparent that the appellants have studiously ignored and disregarded the Federal cardinal rules applicable to Longshoremen's and Harbor Workers' legislation, that said act shall be interpreted liberally in favor of the longshoremen and that all doubts and technicalities shall be resolved in favor of the longshoremen. In direct disregard of these settled and adjudicated principles and in disregard

of the fact that this legislation is fundamentally remedial legislation, appellants have adopted a hypertechincal position with the obvious objective of defeating the purposes of awarding compensation to those properly entitled thereto. However, from the maze of decisions and arguments set forth by appellants in their brief, their contentions can be simmered down to three points, viz:

Point A: The Act granting relief to Clark gives him privileges not accorded to other longshoremen, and denies the equal protection of the laws to appellants.

Point B: It deprives appellants of property without due process by destroying a vested property right based on the compensation order in favor of Clark.

The last point, C, merely gives illustrative decisions construing State statutes allegedly similar.

Answer to Point A—Equal Protection

Although in the foregoing appellants clearly differentiate between the denial of their rights under the equal protection of laws (Point A), and their being deprived of vested rights in violation of due process of law (Point B), they labor by citation of authorities to show that "due process of law" and "equal protection of laws" mean one and the same thing.

The device used to arrive at this conclusion is the seizing of excerpts torn from the text of various decisions as a basis for a confusion of the two. Many cases are cited which state that the words "due process" in the Fifth Amendment are identical in

meaning with the same words in the Fourteenth Amendment. Other loose language is quoted which gives broad definition to the words "due process."

The distinction, however, between the two, has been pointed out by appellants in the cited case of *Truax v. Corrigan*, 257 U. S. 312, 331, 332, 66 L. ed. 254:

> "This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any state to deny to any person the equal protection of the laws. The clause is associated in the amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, *but the spheres of the protection* they offer *are not coterminus.*" (Our italics)

Reference to page 34 of Appellants' Brief will show that appellants have inserted three asterisks to follow the above quoted portion of the decision, and *what follows* is apparently not in accord with appellants' argument, *so is omitted* by appellants. Appellee, therefore, now quotes the omitted portion:

> "The due process clause, brought down from Magna Charta, was found in the early state constitutions, and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal Government, *while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation.*"

The more recent case of *Independent Pier Co. et al.*

v. Norton, Deputy Commissioner, 12 Fed. Supp. 974, confirms the settled rule of this court that the inhibition against states does not apply to Congress, and this case involves the Longshoremen's and Harbor Workers' Act and is quoted from as follows:

"SUPPLEMENTAL OPINION

"Since writing the above we have been favored with a supplementary brief on behalf of the plaintiffs which discusses with marked ability a phase of the above case which we did not have in mind in formulating the conclusions above stated. This feature is brought out by a comparison of the following dates:

March 3, 1934. Monahan order made.

April 2, 1934. This order under the provisions of the then law became final.

May 26, 1934. Amendment providing for the opening of proceeding within one year (33 U.S. C.A., Sec. 922).

"The point made is that the amendment does not apply to orders which had become final before the passage of the amending act.

"The propositions advanced are:

(1) The Monahan order became final nearly two months before the amended act was passed.

(2) Thereafter the employer had in the order what is called "a vested right."

(3) The act does not apply to proceedings which had been concluded and the order in which had become final before the act was passed.

(4) If it does apply, it is unconstitutional under the Fifth Amendment to the Constitution of the United States.

"Under the law as it then was, it must be conceded that the award was not only final in the appellate sense but it had become a finality. If the law had not been amended, neither the commissioner himself nor his successor had jurisdictional power to reopen the case after April 2, 1934. Just what is meant or gained by ascribing to a debtor a vested interest or a property right in the debt he owes is not altogether clear. It is intelligible enough to say that the employer's money is his property and that he cannot be deprived of it without due process of law.

"This plaintiff has been deprived of some money by one order of the commissioner, and it is proposed to deprive it of more by another order. It is not denied that the first deprivation was in pursuance of due process of law. The sole question is whether the second is also. If the amendment of 1934 has no application, the second award was not due process. It must likewise be conceded that retroactive laws, like *ex post facto laws*, are thought by many people to be unjust. The former, however, may be classed as in line with due process of law, although the latter may not be. It must likewise be conceded that in deference to the general judgment of their injustice laws are not given a retroactive effect unless such be their real meaning. The question then is whether this law was meant to apply to this kind of a case. This case is clearly within its veribage. The act is not limited to cases thereafter arising because it applies to cases

'whether or not a compensation order has been issued,' and as a year's time is given for the reopening, it must necessarily extend to cases in which the order is older than thirty days. There is, moreover, a distinction between an appeal or review of an entered order, and a reopening of the proceeding in which the order was made. The first challenges judgment of the order on the facts and the law as of the time when made; the second proceeds upon a new state of facts brought to light a year or more after the order was made and results in a new order. The difference is that between the allowance of an appeal and the granting of a new trial. The first was limited, and still is, to thirty days; the latter has a much longer time. The reopening review is allowed of any case, and this means the instant case.

"*The argument is thus reduced to that of the unconstitutionality of the act.* We assume the taking of property without just compensation provision does not apply. *What is relied on is the due process clause. No state can pass an act which impairs the obligation of debt. The inhibition does not apply to Congress.* What the law does is to lend its aid to the enforcement of a claim of debt. It may impose such conditions as are deemed wise. Among those imposed are limitations of time within which an action may be brought and after which it cannot. *The amendment in question is a mere extension of the time.* The old act limited the reopening, among other things, to the time of 'the term of the award.' The amended act substitutes the year limit. The old act, however, allowed it 'after compensation order had become final.'

"The cited cases which were ruled before the act have no application nor the cases which refer to an appeal review as distinguished from an application to reopen.

"We adhere to the conclusion before reached *that the commissioner had the jurisdictional power to reopen the order which had before been made.*"

Again, it is stated that the "equal protection of the laws" clause under all of the authorities is a clause involving the 14th Amendment and it is elementary that the Fourteenth Amendment applies to state action only and not to the Congress of the United States.

In this connection it may be stated that with reference to the Fourteenth Amendment and the making of arbitrary class distinctions, and the equal protection clause, the rule is set out in 12 Corpus Juris, page 1130, as follows:

"The constitutional provisions referred to prohibit only *state action* in making of unreasonable or arbitrary class distinctions and *do not* prohibit action by Congress or by individuals."

Thus, it can be seen that Congress is not limited in the manner that the states are limited.

In 6 R.C.L., Sec. 234, p. 248, the amendments to the federal constitution are discussed and the rule is stated that:

"The Fourteenth Amendment prohibited the *states* from abridging the privileges or immuni-

ties of citizens of the United States, by depriving them of life, liberty or property without due process of law, and from denying to any the equal protection of the laws."

Also, it states:

"*Under the Fourteenth Amendment*, it has power to counteract and render nugatory *all state laws* and proceedings which have the effect to abridge any of the privileges or immunities of the citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the *equal protection of the laws.* These Thirteenth and Fourteenth Amendments were intended to be what they really are, *limitations of the power of the states* and *enlargements* of the *power of Congress.*"

In 6 R.C.L., Sec. 261, p. 279, the rule is stated as to the Fourteenth Amendment:

"In other words, the object of the Fourteenth Amendment was to prevent an exercise of the independent power left to each *state* in favor of its own citizens in respect to their common personal rights as citizens and against a participation in the same rights by citizens of other states."

No decision of this court has been cited which merges the Fifth and Fourteenth Amendments in the manner argued by appellants.

The next contention under Point A is that Clark is accorded special privileges not accorded to other longshoremen. Of course, even were this true, appellants are not in a position to complain that their

rights are affected by such a claimed discrimination, and if they rested the case upon this ground, their standing in this court would be seriously questioned. All of the equal protection cases cited by appellants contemplate substantive rights. Not a single case cited in Point A of the brief deals with a situation like the one presented in this case because they deal with substantive rights. The instant case deals with *remedy* only. They say this law confers benefits on one and selects appellants for all burdens and exhausts itself upon the parties to this litigation alone. But no new benefits are conferred; no new burdens are imposed. It simply extends the time within which the right to apply for benefits on the one hand can be pursued, and on the other hand, extends the time within which the appellants must come in and defend or present any defenses on the merits that were available not based upon the lapse of time.

Answer to Point B—Due Process

Under this point, beginning at page 38 of appellants' brief, appellants first cite the only two cases which they contend show an attempt by Congress to determine property rights of private individuals. *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49 (1899) first cited involves an effort by Congress by resolution to authorize the Secretary of the Interior to deal with property which by treaty made with the United States, was transferred to an Indian Chief. The case involved no labor compensation act, no statute of limitation, no attempt to suspend the bar by extension of time. It is neither analogous nor remotely in point.

The appellants cite the case of *Pocono Pines Hotel Co. v. U. S.*, 73 C. Cla. 447 (1932) on page 39 of their brief, where an act of Congress remanded the case to the Court of Claims for further investigation of the facts. If anything, such an act would support the act here attacked, but appellants boldly quote that portion of the decision of the Court of Claims which discusses an act which was *not passed nor before the court.* This is typical of the "persuasive" authority cited by counsel for appellants, since any authority sustaining their contention is not available.

However, it is noteworthy that even in the quoted dicta, on page 41 of appellants' brief, the position of appellants crumbles:

> "*Congress has frequently waived by special act defenses* which were available to the United States in the prosecution of claims in this court. Suits of Indian tribes invariably involve the *statute of limitations* and legal and equitable rights. Numerous cases, quite too many to cite, may be found in the reports of the court where Congress impressed with the equitable justice of the plaintiff's demand, and *convinced that save for technical defenses the plaintiff would have recovered judgment, has waived the same by special act* and the cases have been adjudicated by this court under such acts." (Italics ours)

The act assailed in the case at bar is no more than a suspension of the bar of limitations, a procedural device for terminating litigation as promptly as possible. *But a policy to terminate litigation promptly is transcended by the policy of the original act to*

allow compensation to workmen wherever a liberal construction of the act will permit.

Nor is the compensation order of August 26, 1931, such an order as vests any property right in appellants. For by the express terms of the act the order is subject to reconsideration and reopening for change of condition or mistake.

The jurisdiction of the deputy commissioner is a continuing one, and this being so, then the order or award of August 26, 1931, did not vest rights with any finality as to the appellants, particularly where the rights of the workman Clark had never been accorded consideration to which he was entitled.

In the instant case no award is made by the Act of Congress; the law does not direct payment of money by one private person to another. If no merit was found in the claim, appellants would not have been injured, and if there was merit in the claim of malpractice and total disability, but discovered afterwards, there was merit in the claim before the total disability and malpractice were discovered.

The appellants have been deprived of some money by one order of the commissioner, and it is proposed to deprive them of more by another order. It is not questioned that the first deprivation was in pursuance of due process of law. The only question is whether the second also is by due process of law. The reopening proceeds on a set of facts BROUGHT TO LIGHT after the order was made, and results in a new order. What the law does is to lend its aid to the en-

forcement of a claim. The original law imposed limitations of time within which an action could be brought and after which it could not be brought. The law in question merely extends the TIME. The amending law substitutes a different time limit and in effect retains jurisdiction in the commissioner to reopen the order which had previously been made.

Appellants had all the rights reserved to them that they had originally; they had all legal safeguards they had originally. The only thing the law does is to change the time. Due process of law is specifically reserved to them in the act extending the time. The procedure was to be in accordance with the sections of the general law and the act in question even provides that any new order that is made should not affect previous payments of compensation for which the appellants are to receive due credit.

In connection with this phase of the act when the Circuit Court of Appeals for the 9th District had the instant case before it as reported in 95 Fed. (2nd) 203, at page 206, it stated:

> "It is suggested that the private act in question is not amendatory of, or supplementary to, the Longshoremen's and Harbor Workers' Compensation Act, and that no remedy by appeal or at law is given in it; hence, appellants may not be entitled to the benefit of the judicial protection afforded by the general statute. The suggestion is purely fanciful. The private act directs a review of the earlier order and the making of a new compensation order in accordance with the procedure prescribed in section 19, notwithstanding

the provisions of section 21 and section 22 of the act, as amended by Act May 26, 1934, §5, 33 U.S.C.A. §922. *It is obvious that Congress intended the general act to be controlling in all respects, except that finality is not to be attributed to the earlier order* under section 21, *and that a review is to be accorded notwithstanding the expiration of the time limitation* imposed by section 22, as amended, 33 U.S.C.A. §922. * * * And see *Independent Pier Co., et al., v. Norton, Deputy Commissioner*, D. C., 12 Fed. Supp. 974, supplemental opinion."

The legislature has the power to extend the period of an existing statute of limitations.

In the case of *Campbell v. Holt* (115 U. S. 620) it was held that the repeal of a statute of limitations on personal debts does not, as applied to debtor, the right of action against whom is already barred, deprive him of his property in violation of the 14th Amendment of the Constitution of the United States.

The Court said:

"The distinction between the effect of the Statutes of Limitation in vesting rights to real and personal property, and its operation as a defense to *contracts*, is well stated in *Jones v. Jones*, 18 Ala. 248.

"* * * The Court, in its opinion, says this 'will be determined by settling what is the nature of a plea of the Statute of Limitations. Is it a plea that settles the *right* of a party on a contract or judgment, or one that bars the *remedy?* Whatever diversity of opinion there may be among jurists on this point, we think it well set-

tled to be a plea to the *remedy;* and consequently, that *lex fori* must prevail.' So well is this doctrine established, that many states of the union have made it a part of their Statute of Limitations, that when the action is barred by the law of a State in which defendants had resided, it shall also be a bar to an action in those States.

"There are numerous cases where a contract incapable of enforcement for want of a remedy, or because there is some obstruction to the remedy, can be so aided by *legislation* as to become a proper ground of a valid action; as in the case of a physician practicing without license, who was forbidden to compel payment for his service by suit. The statute being repealed which made this prohibition, he recovered in the court a judgment for the value of his services on the ground that the first statute only affected the *remedy. Hewitt v. Wilcox,* 1 Metcalf (Mass.) 154. Of like character is the effect of a repeal of the laws against usury, in enabling parties to recover on contracts in which the law forbade such recovery before the appeal. *Wood v. Kennedy,* 19 Ind. 68; *Welch v. Wadsworth,* 30 Conn. 149; *Butler v. Palmer,* 1 Hill 324; *Hampton v. Commonwealth,* 19 Harris, 329; *Baugher v. Nelson* (9 Gill. 304).

"In all this class of cases the ground taken is, that there exists a *contract,* but, by reason of no remedy having been provided for its enforcement, or the *remedy* ordinarily applicable to that class having, for reasons of public policy, been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy,

enables the party to enforce the contract, otherwise unobjectionable.

"* * * It is much insisted that this right to defense *is a vested right*, and a right of property which is protected by the *provisions of the 14th Amendment.*

"It is to be observed that the word 'vested right' is nowhere used in the Constitution, neither in the original instrument nor in any of the Amendments to it.

"We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

"We certainly do not understand that a right to defeat a just debt by the Statute of Limitations is a vested right, so as to be beyond legislative power in a proper case. The Statutes of Limitation, as often asserted and especially by this Court, are founded in public needs and public policy—are arbitrary enactments by the lawmaking power, *Tioga Railroad v. Blossbury & Corning R. R.*, 20 Wall. 137, 150. And other statutes shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The *right* does not enter *into or become a part of the contract.* No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore,

when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, *show that no right is destroyed when the law restores a remedy which had been lost.*

* * * * * * *

"We can understand a right to enforce the payment of a lawful debt. *The Constitution says that no state shall pass any law impairing this obligation.* But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which this promissor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfill his honest obligations."

The appellants, at page 52 of their brief, have cited the case of *Danzer v. Gulf & Ship Island Ry. Co.*, 268 U. S. 633, which apparently holds that the statute of limitations goes both to the right and to the remedy. This case is utterly inapplicable because, 1st, it applies to claims pertaining to interstate commerce both the right and remedy of which are creatures of statute and to which is not applied the liberal construction of the statute such as is applied in favor of a longshoreman; and 2nd, because the Longshoremen's and Harbor Workers' Act is fundamentally, essentially, and primarily remedial legislation, as is evident from a long line of decisions of the United States Supreme Court. It is interesting to note, however, that the *Danzer* case, among other things, cites the

case of *Campbell v. Holt* (115 U. S. 620), which latter case is relied upon and has been cited by the claimant, and which case distinguishes it on the ground that the *Campbell v. Holt* case "belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to *apply to the remedy only.*" In the case at bar in the absence of any statute, appellee had a right of action against the employer and the remedy was a thing apart from the right of action and the time within which the remedy could be prosecuted could be changed and modified by statute without affecting the right of action itself. Appellants state at page 55 of their brief that the act creates a new substantive right, and yet a most superficial examination of the statute reveals that *no new right is created* and that no defense is taken away save and except the defense based upon the bar of the limitation.

At page 57 appellants state the legislation is an attempted usurption by Congress of judicial functions. It is obvious that the Longshoremen's and Harbor Workers' Act is the creature of Congress, and under the great weight of authority Congress can legislate the remedies and modify the limitation period.

In *Crowell v. Benson*, 285 U. S. 22 (76 L. ed. 598) this Court in passing on the constitutionality of the original Longshoremen's and Harbor Workers' Act and the objection taken thereto under the Fifth Amendment, speaking through Chief Justice Hughes, stated, at page 53, quoting Chief Justice Taney:

"The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime *jurisdiction.*' But it does not direct that the courts shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, * * * are subject to the regulations by Congress. * * * In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description * * * modify the practice of the court in any other respect that it deems more conducive to the administration of justice."

At page 47 the court states,

"The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments."

The *Danzer case*, 268 U. S. 633, at 636 and 637, recites as follows:

"We need to reexamine the doctrine of Campbel *v. Holt*, 115 U. S. 620, as it is plain that the case does not apply. That was an action on a

contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained and that such repeal did not deprive the debtor of his property without due process of law in violation of the Fourteenth Amendment. The decision rests on the conception that the obligation of a debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only, and that the removal of the bar was *not unconstitutional.* * * * That case belonged to the class where statutory provisions fixing the time within which suit must be brought to enforce an existing cause of action are held to apply to the *remedy* only."

The case of *Campbell v. Holt*, 268 U. S. 633, is also cited in the case of *Central Hanover Bank & Trust Co. v. United Traction Co.*, 95 Fed. (2nd) 50, 55, in which case the following appears:

"The statute has been considered as merely suspending the creditor's remedy, not as extinguishing debtor's obligation;"

In the case of *Reppel v. Board of Liquidation* (1935) 11 Fed. Supp. 799, at page 804, the following appears:

"It can hardly be said that the change in personnel in the sewerage and water board affects any vested rights of the bondholders, but, if it be conceded for the purpose of discussion that it does, the answer is plain. Vested rights are not mentioned in the United States constitution and

> they cannot be asserted against the police power of the state. In the exercise of police power, a state legislature may pass a law which divests rights vested by law, provided its effect be not to impair the obligation of a contract."

The above case cites the case of *Campbell v. Holt* (*supra*).

Referring to the power of Congress to provide an additional remedy, the case of *Phillips v. Commissioner*, 283 U. S. 589, beginning at 600, states:

> "It is urged by *amici curiae* that the method of assessment and collection permitted by section 280 (a) (1) cannot be applied where, as in the case at bar, the transfer of assets, upon which the transferee's liability is based, occurred prior to the enactment of the revenue act of 1926; and moreover, as it applied retroactively to said transfer, the section would be unconstitutional. *The power of Congress to provide an additional remedy for the enforcement of existing liabilities is clear.*"

In 20 Amer. Dec. 391, in the note entitled—"Statutes of limitation when constitutional,"—the law, in part, is stated as follows:

> "Where there is an existing statute of limitations, the legislature may pass an amendatory act which either shortens or extends the time within which an existing cause of action may be barred. Such statute is not unconstitutional, as being in conflict with the provisions of the United States Constitution, which forbid the states to pass laws impairing the obligation of contracts," etc. (numerous cases cited).

Under the general power to enact and repeal statutes of limitation is included the power to suspend,

Pearsall v. Kenan, 28 Am. Rep. 336,

and such suspension does not impair the obligation of contracts or violate any other constitutional right.

Searle v. Adams, 89 Am. Dec. 598;
Wardlaw v. Buzzard, 94 Am. Dec. 148;
Luter v. Hunter, 98 Am. Dec. 494.

In the recent case of the Washington State Supreme Court—*Crabb v. Dept. of Labor & Industries*, 186 Wash. p. 505, it was held that although a claim was invalid unless filed within one year from the date of the injury, the court ordered the claim considered by *adopting liberal rules as to the Workmen's Compensation Act.*

Another case in principle, in law and in fact in point with the case before the court, is *Mattson v. Department of Labor & Industries of Wash.*, 293 U. S. 151; 76 Law Ed. 251, 29 P. (2nd) 675. This case was appealed from the decision of the Supreme Court of the State of Washington to the Supreme Court of the United States (176 W. 345).

The applicable facts are these:

Until March 15, 1927, a claimant could claim further compensation without limit as to time on account of an aggravated condition and while this law was *in effect* claimant was injured. On March 15, 1927, an amendment was made to the above law limiting the time to claim for aggravation *within three years*

after the compensation was terminated. However, about five years after the compensation was terminated, claimant filed a claim for aggravation and contended the three-year amendment was unconstitutional, claiming that he had a "vested right"—that it was property—because at the time of his injury the law as it was then in force permitted him to file a claim for aggravation on account of said injury without limit, and that "its enforcement may not be abolished or limited consistently with the due process clause of the *Fourteenth Amendment* of the Federal Constitution."

The Supreme Court of the United States, speaking through Mr. Justice Roberts, stated:

> "The section under attack, merely *limits* the time for the assertion of the right, affects the *remedy* only, and that in a manner not unreasonable, arbitrary or oppressive. Such a limitation of time within which appellant's *remedy* must be pursued does not deprive *him of due process*. The judgment is affirmed."

The discriminatory argument is not true. Congress is not conferring any new substantive rights upon the employee, and Congress does not take away any available defenses of the employer, based upon the merits. The single thing that it does is to confer the right to a re-examination of a case based upon conditions existing at the time of the first award, but the discovery of which occurred subsequent to the entry of the original award. The Act does not attempt or purport to classify the rights of the parties.

Appellants contend that because the order did not involve "fraud," it must stand. But what the order does involve is a MISTAKE and MALPRACTICE, which is tantamount to fraud in so far as the validity of the order is concerned if it were challenged on that ground.

On page 22, appellants contend the act is "tyrannical legislation—it establishes government by edict or discriminatory order and discards government by law." On the contrary, the legislation is in harmony with the spirit and intent of the Longshoremen's and Harbor Workers' Act, *i. e.*, to award compensation to those entitled thereto, and an examination of the challenged statute patently reveals that every legal safeguard reserved to appellants under the Longshoremen's and Harbor Workers' Act of March 4, 1927, is retained for the protection of appellant under the special statute here attacked. The procedure was to be governed by the general law on the subject. Credit for any previous compensation was specifically directed to be allowed, and the only element affected was that the limitation of time provided under the general law was to be waived, not for the purpose of awarding or granting to the appellee any new right, but to determine his right to compensation on account of the injuries sustained and the malpractice performed, but discovered after the Commissioner felt that technically he had lost jurisdiction under the general act.

It does not discard government by law; it does not

change the procedure. The only element affected in any way is the time.

By analogy the instant case is identical with the case of *Williams v. Norris*, 12 Wheaton's Reports (U. S.) 117, because in that case the effect of the private act was not to give any new title and thereby impair the obligation of a contract but to modify the evidence with which one's *incipient* title could be established. In the present case no new right was conferred or taken away. But the limitation of the statute upon the time within which a re-examination of the case could be made was extended. The opinion was writen by Chief Justice Marshall of the United States Supreme Court. In that case the title of one Norris depended upon a private act in his favor and it was claimed to be repugnant to the Constitution. The act provided in part as follows:

> "Be it enacted, etc., that the commissioner of West Tennessee be, and he is hereby authorized to issue to E. Norris certificates or warrants to 2280 acres, on which no warrants or grants were issued, provided, Norris produced evidence sufficient to the said commissioner that the consideration for said entries was paid, and that no warrant or grant ever issued on said entries."

When the act was passed, a patent had been granted to plaintiff in error on land covered by entry of Norris. The Court at page 125 said that:

> "If its (the act's) effect was to annul that patent, and to give new title to Norris, the act would come within the decision of this court in

the case of *Fletcher v. Peck*, as a law impairing the obligation of contracts. * * * If the purchase money was paid, the entry was valid. If not paid, the entry might be void or only voidable. * * * It is a question for the legislature and courts of the state, and its decision the one way or the other would not be repugnant to the constitution of the United States."

At page 127 the court continues:

"Had the claim of Ezekiel Norris been decided by the commissioners, acting under the general law, it probably would never have been contested. What difference is there, so far as respects its constitutionality, between the act passed in his particular case, and the act containing a general reference of all cases of the same description to the commissioner?"

* * * * * * *

"If this be correct, *if the legislature might have dispensed with this testimony in a general law, why may it not be dispensed with in a particular law, where its effect on the cause is precisely the same, as if it had been general?* There are, undoubtedly, great and solid objections to legislation for particular cases. But *these objections do not necessarily make such legislation repugnant to the constitution of the United States.*"

" 'The act for the relief of Ezekiel Norris,' did not authorize the commissioner to grant him a certificate or warrant on his entry, unless he should prove that the purchase money had been paid. The laws had preserved such entries, and consequently an act to enable the proprietor of

one of them to prosecute his claim, is not necessarily an act impairing the obligation of a contract."

"The question whether the judgment of the commissioner was conclusive evidence that the purchase money had been paid, is entirely distinct from the constitutionality of the law, and the decision of the state court upon it cannot be revised in this court."

If Congress could have extended this time by a general law, "why," quoting from *Williams v. Norris, supra*, "may it not be dispensed with in a particular law where its effect on the cause is precisely the same as if it had been general?"

On page 48 of appellants' brief, they contend the act deprives them of substantive rights and is not merely procedural. *But claimant had an incipient right of action capable of being carried into an award. The law does not confer any new rights.* In *Williams v. Norris, supra*, the legislature had a right to determine what should be the evidence of payment that would be received. In the case at bar the Congress had the right to determine the time within which remedy should be pursued. In the *Norris* case, if a general law had been passed it is doubtful if the statute would ever have been challenged. This is true in the case at bar. It is the form they object to—both cases relating to the time within which the remedy had to be pursued. In the *Norris* case the legislature could have dispensed with testimony by a general law. But the fact that they sought to do so by a

particular law did not affect its constitutionality although undesirable in form. The analogy and the same reasoning holds true in the case at bar. In the case at bar the law did not authorize the commissioner to make any award until the claimant should prove under the general and established law that he had a right to an award. Under the law his claim was a matter of record and consequently an act to enable him to prosecute his claim is not necessarily an act impairing the obligation of a contract. In both cases the question was: Whether the private act affected only the remedy. By their own argument the fact that the Fourteenth Amendment was not in effect at the time of the decision rendered in the *Norris* case does not make any difference because the Fifth Amendment was in effect. They argue *it has the same effect as the Fourteenth.* Appellants contend, at page 51, that Private Act No. 445 is not purely remedial and does not purport to modify procedure whereby an existing cause of action may be enforced. Indeed it does not go that far. It does not modify any procedure. *It merely lengthens the time within which the same procedure may be made available.*

On page 23, appellants flourish in generalities viewing with alarm the dangers of political meddling, etc., if the prese: : Act is sustained. But this seems absurd, when we consider that Congress in the first instance passed the Longshoremen's and Harbor Workers' Act, and likewise passed the second act, and Congress is the only constituted body that can do so.

It is again repeated that all of appellants' argu-

ments about due process of law fail to consider the true purpose of the law that was passed, a close examination of which reveals that not a single defense based on the merits of the controversy has been taken away or any right granted of any kind, character, or degree enlarging, or changing the rights of the parties save and except the single circumstance that the barrier of the time limit granted for reopening has been modified in order to have a hearing upon the merits because of conditions which existed at the time of the first award, but which were subsequently discovered.

On page 26 of appellants' brief, we can accept the definitition of due process of law in *Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232 (1884), and still find nothing objectionable in the law being challenged in the case at bar. This is NOT A SPECIAL RULE for a particular person or a particular case because reserved and preserved to the appellant was its right to a hearing before award based upon proper inquiry with a judgment rendered only after trial. No penalty was invoked; no confiscation occurs. No judgment was reversed. There is no act transferring one man's estate to another. It does not arbitrarily enforce any edict upon one person or his property by merely permitting a re-examination of the facts of the particular case. Appellants are claiming a vested right in the time within which a remedy may be pursued.

In *Bechtel v. United States*, 101 U. S. 597, 25 Law. Ed. (U. S.) 1019, the following appears:

"A remedial statute is to be liberally construed with reference to the purpose of its enactment."

The remedial nature of the legislation in question is sufficient to save it from constitutional objection. What is due process of law depends upon the circumstances varying with the subject matter and the necessities of the situation. *Moyer v. Peabody*, 212 U. S. 78, at 84. In the note in 24 Lawyers' Edition, 436, due process of law is described as follows:

"Due process of law is the regular administration, through courts of justice, by a timely and regular course of proceeding to judgment and execution. As a rule, it includes parties, regular pleadings and a trial, according to the settled course of proceedings."

In 6 R.C.L., Sec. 442, p. 446, the following appears on due process of law:

"In General.—The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. In fact one of the most famous and perhaps the most often quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College case, in which he declared that by due process of law was meant 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial'."

In *Imhoff-Berg Silk Dyeing Co. v. United States*, 43 Fed. (2nd) 836, at 843, the following is helpful:

"Plaintiff's final contention that, inasmuch as the statute had run at the time of the collection,

Congress was then and is still without the constitutional power to remove the bar, cannot be sustained. *It is well settled that there is no vested right to rely upon a statute of limitation to defeat a debt or other personal obligation; the Legislature which imposed the bar may remove it.*"

In the *Campbell v. Holt* case, *supra*, the cause was based upon a debt; in this case, on a just claim, although unliquidated. Statutes of limitations are founded in public needs and public policy and are necessary and arbitrary enactments by the lawmaking power. The right here claimed to be affected is similar to the right affected in that case. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no rights of his. No right is destroyed when the law restores a remedy which had been lost. We do not understand the right to satisfy an obligation, or the right to withhold proper compensation, by a protracted failure to pay. No one has a right in law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfill his honest or proper obligations.

Also, in 6 R.C.L., Sec. 281, p. 294, the following appears:

"*Modification of Procedure.*—The prohibition as to the passage of *ex post facto* laws has no application to changes which relate exclusively to the *remedy* or *mode of procedure. A person has no vested right in any particular remedy,* and he cannot insist on the application to the trial of

his case, whether civil or criminal, of any other than the existing rules of procedure. *Statutes making changes in the remedy or procedure are always within the discretion of the law-making power*, and are valid so long as they do not deprive the accused of any substantial right, or conflict with specific and applicable provisions of the federal constitution."

In the case of *Smolen v. Industrial Commission, et al.*, 324 Ill. 32, 154 NE. 441, a statute was passed extending the time for review of an award on the ground that the employee returned to work. The Court said at page 443:

"The repeal of a law cannot impair vested rights which have been acquired under it and the passage of a new law cannot by its retrospective operation impair such vested rights, but the legislature has the right to change the limitation laws of the state with respect to existing causes of action and to change the laws of procedure, * * *."

"* * * The rule is well settled that the changing of a remedy for the enforcing of a contract does not impair its obligation. The remedies which the law affords to enforce contracts constitute no part of the contracts themselves. *Chapin v. Billings*, 91 Ill. 539; *Gage v. Caraher*, 125 Ill. 447, 17 NE. 777."

In the case of *Otis Elevator Co. v. Industrial Commission*, 134 NE. 19, 302 Ill. 90, it was held that where a statute confers a vested right such right cannot afterwards be altered or amended so as to destroy it, but if a change in the law affects only the

remedy or procedure, all rights of action are governed thereby, without regard to whether they accrued before or after such change, and without regard to whether suit has previously been instituted or not, unless there is a saving clause as to the existing litigation.

In *Hulbert, et al. v. Clark, et al.*, 11 N. Y. Supp. 417, 28 NE. 638, the following appears at page 638:

> "The statute of limitations does not, after the prescribed period, destroy, discharge, or pay the debt, but it simply bars the remedy thereon. The debt and the obligation to pay the same *remain*, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The legislature could repeal the statute of limitations, and then the payment of a debt, upon which the right of action was barred at the time of the repeal, could be enforced by action, and the constitutional rights of the debtor are not invaded by such legislation. It was so held in *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. Rep. 209. It was held in *Johnson v. Railroad Co.*, 54 N.Y. 416, that the statute of limitations acts only upon the remedy; that it does not impair the obligation of a contract, or pay a debt, or produce a presumption of payment, but it is merely a statutory bar to a recovery; and so it was held in *Quantock v. England*, 5 Burrows 2628, and so it has ever since been held in the English courts."

Sampeyreac and Stewart v. U. S., 7 Peters U. S. 222, held that an act which provides for orderly procedure to be followed by court action is constitutional even though it creates a new remedy for a

right previously passed on because such legislation is merely remedial and there is no vested right in the *mode of procedure.*

At page 237 of said case the following appears:

> "The ground upon which it has been argued that the act of 1830 is unconstitutional, is, that a right had become vested in Stewart before the act was passed; and that the effect and operation of the law is to deprive him of a vested right. To determine the force and application of of this objection, it becomes necessary to look at the claim, as it now appears, before the court."

On page 238 the following appears:

> "No appeal was taken within the year; and the question is, whether the United States, by neglecting to appeal, have lost their right; and if not, whether the remedy provided by the act of 1830, to assert that right, is in violation of the constitution."

At page 239, the following appears:

> "But, considering the act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed. The law of 1830 is in no respect the exercise of judicial functions. It only organizes a tribunal with powers to entertain judicial proceedings."

In *Luria v. United States*, 231 U. S. 9, at 25, *Mr. Justice Van Devanter*, speaking for the court, said:

"Nor is it a valid objection to such legislation that it is made applicable to existing causes of action, as is the case here, the true rule in that regard being well settled in Cooley's Constitutional Limitations. 7th Ed. 524, in these words: 'It must also be evident that a right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the state provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like all other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those states in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before."

Point C—State Cases

POINT C cites six cases, which, in the absence of any authority from this Court favorable to appellants on the point raised, are claimed to support appellants' views.

First, the cases cited are all state cases, all involving state statutes, and are in each case decided under the special terms of the State constitution. Where gen-

eral language is used in the decision, the court had in mind the state constitution and its prohibitions. How any analogy can be drawn between these cases and an Act of Congress, is not clear. Nor are the cited cases all in point.

Riggs v. Lehigh Portland Cement Co., 131 N.E. 231, concerned a statute which sought to amend the compensation act by allowing a minor child to recover compensation in spite of the remarriage of its mother which remarriage, the old act said, terminated all rights. No statute of limitations or other procedural matter was involved. Also, a person who previously could not recover sought to recover under an Act which did not state or indicate that it should be retroactive. The case at bar so obviously intends retroaction that the analogy is again lost.

At p. 232, the court, in the *Riggs* case, states:

> "To give to the amendment the effect desired by appellant would be to confer on the child a substantive right which she did not possess at the time of the injury and death of her father * * *. *There is nothing in the amendment to indicate that the Legislature intended that it should affect awards previously made.* The conclusion we have reached on this phase of the matter makes it unncessary to discuss the question whether or not the contrary conclusion would conflict with certain constitutional limitations."

The *Casieri's* case, 190 NE. 118 (Mass.) is decided in a jurisdiction where judicial opinion is not too certain on the character of function performed by the

Compensation Board. The case cited seems to hold that the decisions of that tribunal "and partake of the nature of a court's decisions". But the Chief Justice (Rugg) in *Ahmed's* case, 179 NE. 684 (278 Mass. 180), held for the same court that "The present statute does not apply to judicial proceedings in the courts. It relates solely to the peculiar class of controversies as they arise under the Workmen's Compensation Act before a purely administrative tribunal." The *Casieri* case says:

> "The statutes questioned pass beyond the line of legislation with regard to procedure, and, so far as retroactive, must be held to be inoperative."

The *Ahmed case* says:

> "Since said chapter 208 relates solely to costs and procedure, it applies to all cases after its effective date."

Of course, even if the *Casieri* case actually overrules the *Ahmed* decision, it is still concerned only with a state statute, governed by state constitutional limitations. These cannot bind this Court in the present case, nor is the decision analogous in any respect.

Also, *Casieri's* case is not a case involving a special statute—but a general statute, and merely holds that a statute which seeks further hearings as to whether the later incapacity of petitioner employee is the result of injury for which he received compensation, is unconstitutional, and simply holds that an award is property and final and that it is in effect

a judicial decision. This is contrary to the Federal cases involving compensation laws and conflicts directly with the *Ahmed* case, *et al.* (Mass.) 179 NE. 684, and numerous state decisions.

The case of *Decker v. Pouvailsmith Corp.*, 252 N.Y. 1; 168 NE. 442, in its facts is, of course, not analogous to the case at bar, as it also involves a state statute and state constitutional limitations. Its language also limits its holdings, and indicates that if a case more nearly analogous to the case at bar would come before it, the ruling would be favorable to such an act. Judge Pound, concurred in by Judge Cardozo, said:

> *"Such a statute might be made retroactive without impairing any constitutional rights of the employee.* When no property rights have become vested by lapse of time the Legislature may remove the statutory bar when it confers 'an immunity which is contrary to all prevailing ideas of justice.' *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271, 279, 144 NE. 579, 36 A.L.R. 1310. It was not until our decision in the *Noreen* case, *supra*, in 1921, that claimant learned that he had mistaken his remedy. The Legislature might properly grant relief in such cases. The rights of minors under the Workmen's Compensation Law might well be the object of legislative solicitude. *But the Legislature must make clear its purpose to make the statute retroactive* and applicable to the case at bar. *Robinson v. Robins Dry Dock & Repair Co., supra. It has failed to indicate that the amended section should apply to cases where the statute*

had already run. To say that such was its purpose is to indulge in speculation. The Court may not give a retroactive effect to a statute to revive claims already barred under the old section unless the legislative purpose is defined by express language and by necessary inference."

In the *Decker* case also, *no claim* of any kind for compensation was filed *within a year*, as required, after the accident.

In fact New York has decided where the retroactive intent was clear, in the case of *Montgomery v. Seneca Iron & Steel Company*, 257 N.Y. Supp. 556, that the remedy may be revived. In this case an accident occurred on August 1, 1929, and the state statute provided:

"The Board may, within one year from the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interests of justice."

In 1931, three years were substituted for the one year, and the case of the claimant was reopened. The Court said:

"It is conceded that subdivision 6-A is retroactive (* * *) and that the 1931 amendment is applicable to accrued as well as future claims."

* * * * * * * *

"No right is destroyed when the law restores a remedy which has been lost. *Campbell v. Holt*, 115 U. S. 620, 628, 6 S. Ct. 209, 213, 29 L. Ed. 483. See, also, *Robinson v. Robins Dry Dock &*

Repair Co., 238 N. Y. 271, 144 NE. 579, 36 A. L.R. 1310."

The act in the case at bar clearly calls for the retroactive effect and the implication from the language of the New York Court is that if such were the case before them, the act would be within the legislative power.

The case of *Roles Shingle Co. v. Bergeron, et al.*, 19 Pac. (2nd) 94 (Ore.), was decided on the basis of a direct violation of Art. I, Sec. 20 of the State Constitution that "no law shall be passed granting to any citizen or class of citizens privileges and immunities which, upon the same terms, shall not equally belong to all citizens." The workman was killed and his sister filed a claim for compensation with the accident commission, alleging dependency. The commission denied the claim. She took an appeal to the Circuit Court, which found in her favor, and the commission appealed to the Supreme Court of the State, which reversed the Circuit Court because appeal was not taken in 60 days as provided by law. A few years later legisature passed a bill authorizing and directing a reopening of the case and claim, to give a full hearing on merits, etc. In Oregon the constitution also provides that "The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law." Art. 7, Sec. 1, Constitution of Oregon.

The Court further stated:

"The State Industrial Accident Commission

> is not a court within the meaning of the said section. It is simply the administrative medium through which the state functions in regard to employees who are entitled to compensation for injuries received in the course of their employment under the Workman's Compensation Act. *These functions are not judicial.*"

The Court then simply holds that "the legislature cannot annul or set aside the final judgment of a court of competent jurisdiction." Such holding is not remotely analogous.

In *State v. Industrial Accident Board*, 23 Pac. (2) 253 (Mont.), claimant in the first instance failed to serve written *notice of accident*, as required, and therefore the statute giving continuing jurisdiction to its orders did not apply because the order was not such as might be subject to changing conditions, but was a final order and therefore rendered subject thereof *res judicata*.

The Court said, however:

> "As we have indicated, this court in the *Mulholland* case, *supra*, recognized that some of the orders of the board are final, and others are, in a sense, interlocutory. The latter type of order contemplates the so-called continuing jurisdiction of the board. This continuing jurisdiction, as the court said, quoting from an Ohio case (*Industrial Commission v. Dell*, 104 Ohio, 389, 135 N.E. 669, 34 A.L.R. 422) "is to give a Board or tribunal the power to *modify* or change a judgment or order to meet changed conditions, or to *do justice* in the light of newly dis-

covered evidence, or to correct an order which was made as the result of *fraud* or *imposition*, or *an order which would not have been made if certain facts later discovered had then been known to exist.*"

"Therefore, it is fair to say that the proposition of *continuing jurisdiction to enable the board to meet new or changed conditions is a well established priciple of law in this state.* * * *." But the "order specifically, absolutely and permanently denied Magelo any relief or compensation because of *his failure to file his notice* under the provisions of Section 2933, *Supra.*"

The case of *State v. Industrial Accident Board*, 23 Pac. (2nd) 253 (Mont.), also turns on a violation of the express terms of Sec. 26, Art. 5, of the State Constitution of Montana. The language of the court is instructive at page 256:

"The Legislature in enacting Section 2899 and Section 2933, as amended, placed limitations upon the time within which compensation claims might be prosecuted. By simply amending or abolishing these sections and giving their act a *retrospective effect*, they could have accomplished their purpose, without affecting the discrimination achieved by chapter 85, Laws of 1933."

Thus the court holds that a retroactive act affecting the time limit on prosecuting compensation claims, would not be offensive to any constitutional provisions. Since Congress is not inhibited as is the State from enacting special acts, it follows that the act in the case at bar is supported by this authority rather than attacked.

Casparis v. Fidelity Union Casualty Co., 65 SW. (2) 404 (Texas), cited by appellants is quite involved and it is unnecessary to encumber this brief with a detailed statement of the case since a reading of it will immediately make its irrelevancy apparent. Furthermore, a loose statement is made in the case that the legislature may modify or extend an existing remedy, but cannot revive a remedy already barred. This, of course, is directly contrary to the Federal cases on this subject and the weight of authority and only goes to show the admitted divergence of opinion and conclusion between states in treating questions involving workmen's compensation. In passing it might be well to state also that in the cited case the

> "Trial court's ruling that the board had jurisdiction to review its previous order was based on holding that the amendment * * * was retroactive,"

and the court said:

> "In this we cannot concur."

So again in the instant case, the retroactive application of the statute is not doubtful, but is expressly provided for, thereby necessarily removing the cited case as any authority for appellant's various contentions.

Also the case of *Casparis v. Fidelity Union Co.*, 65 SW. (2nd) 404 (Tex.), is decided on questions other than the constitutional violation claimed. The dicta near the close of the opinion is based upon citation of another state case which holds that the controlling

feature is the State constitution giving equal protection to the same extent as the Federal Constitution. Such authority is not even persuasive since the inhibition of the Fourteenth Amendment does not apply to Congressional legislation which is here involved.

Act Should Be Construed In Favor of Constitutionality

Furthermore, it needs no citation of authority that an Act of Congress is to be construed so as to maintain its constitutionality if possible.

In 6 R.C.L., Sec. 77, p. 78, the following appears:

> "It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutonal and by the other it would be valid, the court should adopt the construction which would uphold it."

In 6 R.C.L., Sec. 82, p. 83, the following appears:

> "*Conclusiveness of Federal Decisions as to Federal Questions.*—It is a fundamental principle of the constitutional system of government of the United States that the decisions of the federal supreme court are final and authoritative declarations of the proper and correct construction to be placed on the constitutions and laws of the United States and as to whether a state law contravenes any provision of the national constitution."

The presumption is always in favor of the constitutionality of an act of Congress.

In 6 R.C.L., Sec. 98, p. 97, the following appears:

> "The courts in a long series of cases have

enunciated the general *principle that the presumption is in favor of the constitutionality of a statute.* * * * It has been declared that in no doubtful case should the courts pronounce legislation to be contrary to the constitution; *that to doubt the constitutionality of a law is to resolve such doubt in favor of its validity;* that all statutes are of constitutional validity unless they are shown to be invalid; *and that the courts will resolve every reasonable doubt in favor of the validity of the enactment.* It has been said that every intendment is in favor of its validity, and that it must be presumed to be constitutional unless its repugnancy to the constitution clearly appears, or is made to appear beyond a reasonable doubt; * * *."

The question of the justice or injustice of a statute is for the legislature and not the courts, as pointed out in 6 R.C.L., Sec. 106, p. 107, wherein it states:

"Legislative acts within the power of the legislative body are not subject to revision or control by the courts, on the ground of inexpediency, injustice or impropriety, or because they are contrary to the principles of natural justice or are based on conceptions of morality with which the courts may disagree, or even because they create unjust differences not prohibited by the constitution. The justice or injustice of statutory provisions is a question for the legislature, not for the court."

In 6 R.C.L., Sec. 109, p. 110, the following appears:

"A general presumption exists in favor of the good faith of all law-making bodies; that is, primarily the courts will assume that the law-mak-

ing body considered the effect of legislation on the constitutional rights of the citizen, * * * and that laws are passed in good faith in order *to remedy by proper regulations some evil not* reached or corrected by previous legislation. Courts cannot impute to the legislative department a disregard of any fundamental principle of civil liberty."

CONCLUSION

In conclusion, therefore, it is respectfully submitted that, as stated by the Circuit Court of Appeals in its decision, the general act is controlling in *all respects* except as to the finality of the earlier order.

As far as due process of law is concerned under the act in question, the insurance company and the carrier are entitled to judicial review, and to all of the protection afforded by the Longshoremen's and Harbor Workers' Act. The same procedure applies to claimant as applies to any and all claimants. All of the elements of due process of law as pointed out heretofore, are not violated in any respect. The claimant, as a matter of right, is found to be entitled to compensation. Congress, which originally enacted this remedial legislation, has the power to restore to the claimant his remedy. The Deputy Commissioner, by regular and proper procedure in accordance with all of the provisions of the Longshoremen's and Harbor Workers' Act, makes an award which is rightfully due claimant. Congress in pursuance of its power to pass remedial legislation, merely extended the time. No substantive right has been encroached upon. No one is damaged. Had the claimant been able to pre-

serve his remedy before it was cut off, the insurance company and the employer would have paid to the claimant the compensation found now to be due to him. But since it was claimed to be lost and since the deputy commissioner felt he was powerless to review the award under the existing Longshoremen's and Harbor Workers' Act without further congressional authority, the Congress of the United States restored the remedy and gave the deputy commissioner the authority to proceed in accordance with the general act which controls in all respects. How can the insurance company and the carrier say that their property is being taken without due process of law, when as a matter of right the compensation was the property of claimant in the first instance?

The subsequent finding of the deputy commissioner that claimant was totally disabled from the date of his original injuries conclusively establishes claimant's *right* to the compensation. Is the insurance company and the carrier to be enriched at the expense of the claimant's so-called *loss of remedy* by *lapse* of *time?* Can it be said that the insurance company and carrier obtain a vested right in their unjust enrichment at the expense of an ignorant workman and by reason of the damaging mistake at the hands of both the physician and surgeon and the deputy commissioner who relied on the physician's mistake? Congress had the power in the first instance to pass the Longshoremen's and Harbor Workers' Act. This legislation was *remedial* and the elements of due process of law were incorporated in the original act. The

amendatory act in question, being a mere extension of time, is also remedial and provides for the necessary elements of due process of law. The award is made after proper notice and hearing on all issues, and should be sustained. In any event, as the courts consistently have held, all doubts as to constitutionality under the law should be resolved in favor of the constitutionality of the act and in favor of the longshoreman.

Also, with reference to the act in question, (1) Congress can enact special legislation of the private character here involved; the *Norris* case is authority for that; (2) and this private act does not affect any vested right of appellants, since the mere suspension of the limitation merely revives a dormant right and does not create a new one. The *suspension in all cases* being *inclusive* of the *power to suspend in one*, Congress is no more depriving appellants of due process than if the act passed had applied to all cases barred by the compensation statute of limitations.

Clearly, the issue is: *Had this Act provided suspension in all cases barred by the statute limiting reopening for change of condition or mistake, would appellants have been able to sustain a complaint of constitutional violation?* No, because the mere extension of time for enforcing the right, is not unconstitutional on good authority. If Congress could have passed a general statute suspending the limitation, why not a particular statute? Are appellants dammaged any more by the private character of the act? Of course not. As employers, they should feel that

Congress acted charitably in not passing a general act which might have covered other cases where the bar has already dropped. And the wisdom of Congress in passing the Clark Act is, of course, not to be questioned by the Court, although ample ground for the exercise of its power is shown by the record.

We have assumed, of course, only for the sake of argument, that a constitutional question is involved. The record shows a state of facts which on their face disclose such a set of circumstances as would justify sustaining the claim solely by a reasonable construction of the Compensation Act, Sec. 22 of Chapter 509, Laws of 1927 (U. S. Compiled Stats.). The bar is properly set up against a workman who has been negligent in pursuing his remedy, but against one who because of malpractice by a physician paid by appellants, was kept ignorant of his condition until after the lapse of the statutory period, it would require a strained reading of the language of the section to hold that the bar is complete. The section contemplates application by the workman, and without knowledge of the facts, of course, it is beyond his power to apply within the time limit fixed. The universal and well settled rule of liberal construction of the compensation act, demands that this Court allow the claim of the workman Clark, without regard to the confusion raised by appellants as to constitutional questions.

As stated in *Union Stev. Corp. & Liberty Mutual Insurance Co. v. Norton, Deputy Commissioner*, 98 Fed. (2) 1012 (1938), *supra*,

"Further reference to the contentions of the respective parties would be fruitless. IT IS OUR DUTY TO CONSTRUE THE ACT LIBERALLY AND IN SUCH WISE AS TO EFFECT THE PURPOSE INTENDED BY CONGRESS. * * *."

"THE LONGHOREMEN'S AND HARBOR WORKERS' ACT * * * IS INTENDED TO AFFORD RELIEF TO PERSONS WHO INCUR INJURIES IN THE COURSE OF THAT EMPLOYMENT." The appellee in this case WAS INJURED IN THE COURSE OF HIS EMPLOYMENT AND, as stated by the Deputy Commissioner, "THAT AS THE RESULT OF THE INJURY SUSTAINED THE CLAIMANT WAS WHOLLY DISABLED FROM JANUARY 17, 1931, TO AND INCLUDING JANUARY 5, 1939, * * *; THAT THE TOTAL DISABILITY OF THE CLAIMANT CONTINUED AT THE TIME OF THE HEARING ON JANUARY 5, 1939; * * *." (R. 17, 18). As stated, the courts have decreed liberality of construction in favor of the longshoremen, and rightfully so. Liberality is not an empty word. It does not mean, as appellants are endeavoring to do, to look for technical loopholes to defeat an award of compensation to one entitled to that relief under the Act of Congress. It means that when the injured longshoreman is confronted with a situation as is now presented, the technicalities of the law and the strategy and strict construction of the legal mind shall give way in favor of liberal justice

and consideration for the injured longshoreman. If anything, a construction of the compensation act which would bar this workman under such circumstances would be in clear violation of the Fifth Amendment, depriving him of the right to compensation without due process of law.

Respectfully submitted,

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No. 271

In the Supreme Court of the United States

OCTOBER TERM, 1939

PARAMINO LUMBER COMPANY AND UNION INSURANCE SOCIETY OF CANTON, LTD., APPELLANTS

v.

WM. A. MARSHALL, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND JOHN T. CLARK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

MEMORANDUM FOR APPELLEE WM. A. MARSHALL, DEPUTY COMMISSIONER

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MEMORANDUM FOR APPELLEE WM. A. MARSHALL, DEPUTY COMMISSIONER

This case presents the question of the constitutionality of Private Act No. 445 of April 10, 1936 (c. 198, 49 Stat. 2244), authorizing and directing the United States Employees' Compensation Commission to reconsider a final compensation order entered on August 26, 1931.

Appellant urges that the Act violates due process upon two grounds: because it reinstates a cause of action against a particular employer in favor of

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a particular employee after a final determination by the Deputy Commissioner, and because it lifts the bar of the statute of limitations after it had run.

1. The Government has no interest in the first question since, by definition, it cannot be a question affecting the general legislative powers of Congress.

2. If this case presented the broad question of the power of Congress to lift the bar of an elapsed statute of limitations, there would plainly be a governmental interest in sustaining that power. But we do not believe such a question is presented.

The impact of the due-process clause upon retroactive modifications of a statute of limitations is far from clear. The problem has ordinarily been viewed in a purely formal light, with the result that the varying decisions fall into a rather tangled and unreal pattern. Thus, an action upon contract may constitutionally be revived after the period has run. *Campbell* v. *Holt*, 115 U. S. 620. But if the action be to recover property, the bar of limitations cannot be removed after it has run. *Stewart* v. *Keyes*, 295 U. S. 403, 417. And the Court has indicated that a statutory bar which is enacted as a part of the statute creating the right cannot be lifted after it has run. *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633; cf. *The Harrisburg*, 119 U. S. 199, 214; *Davis* v. *Mills*, 194 U. S. 451. We cannot believe that technical distinctions as to whether the cause of action arises at common law or under a

statute and whether the cause of action relates to a contract or a property right can control the requirements of the Constitution. These factors may be relevant to the scholastic inquiry as to whether the right or the remedy has been tampered with, but "it is quite incredible that such an unsubstantial distinction should find a place in constitutional law." *Davis* v. *Mills, supra,* at 456.

The issue, in truth, is no different from the broad questions ordinarily found clustered about the due process clause. Chief Justice Holmes, writing for the Massachusetts court in *Danforth* v. *Groton Water Co.,* 178 Mass. 472, 477, sustained a retroactive removal of the bar because the facts there presented evoked the principle found in "multitudes of cases" which "have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small." And in *Dunbar* v. *Boston & Providence R. R.,* 181 Mass. 383, 386, he reached a similar result because "in short we cannot say that the Legislature with its larger view of the facts may not have been satisfied that substantial justice required its action." See, also, *Robinson* v. *Robins Dry Dock and Repair Co.,* 238 N. Y. 271.

We think, then, that the legislative power to revive barred causes of action cannot be deter-

mined upon grounds so sterile as those relevant to the metaphysics of right-or-remedy. But, whatever the result of a realistic inquiry as to whether Congress by this Act has accomplished substantial justice or has worked a capricious hardship, the question here reduces itself to the issues which affect only the appellant and the private appellee. With those issues, the Government has no concern.

We therefore shall make no further appearance in this case.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

SUPREME COURT OF THE UNITED STATES.

No. 271.—October Term, 1939.

Paramino Lumber Company and Union Insurance Society of Canton, Ltd., Appellants,

vs.

Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and John T. Clark.

Appeal from the District Court of the United States for the Western District of Washington.

[March 11, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

The question is whether the due process clause of the Fifth Amendment is violated by a private act of Congress directing a review of an order for compensation under the Longshoremen's and Harbor Workers' Compensation Act[1] after there had been a final award by the deputy commissioner and after the time for review of the award had expired.

On January 17, 1931, the appellee Clark fell and fractured a rib while working on the navigable waters of the United States as a longshoreman for the appellant Paramino Lumber Company. The other appellant, the Union Insurance Company of Canton, Ltd., is the insurance carrier of the Lumber Company under the Compensation Act. The fall having disabled Clark, the appellants voluntarily paid him compensation. Then, on Clark's application, hearings were had under the Compensation Act which resulted in a determination on August 26, 1931, by the deputy commissioner that Clark had been wholly disabled from the date of his fall to July 4, 1931, that on the latter date he had recovered from the disability, and that he had been paid by appellants all the compensation due him. No proceedings being brought to review this award, it became

[1] 33 U. S. C. §§ 901-50.

final in thirty days.[2] Almost five years later, the Congress passed a private act ordering the Compensation Commission to review Clark's case and to issue a new order, the provisions in the Compensation Act limiting time for reviewing awards "to the contrary notwithstanding."[3] The information which led the House and Senate Committees on Claims to recommend passage of the act[4] indicated that Clark had first been treated by his employer's physician who operated on his twelfth rib and reported that an examination of the eleventh rib showed a firm union at the site of the fracture of that rib. On the basis of this report the deputy commissioner concluded that Clark had recovered and terminated his compensation. But Clark's pain continued, and within four months of the deputy commissioner's order x-rays taken by other physicians disclosed that the fracture of the eleventh rib was un-united, and in order to give Clark relief an operation fusing the bone fragments had to be performed. After this the rib healed, but in March, 1935, the physician who performed the second operation reported that Clark was still experiencing pain in the region of his injury. Since the deputy commissioner had no jurisdiction over the case after he made his order, and since the time for judicial review expired prior to the time of the operation on the eleventh rib, Clark had no opportunity under the act to have his compensation readjusted.[5]

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[2] 44 Stat. 1436, § 21; 33 U. S. C. § 921.

[3] 49 Stat., pt. 2, p. 2244. The act in full reads:

"That in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: *Provided*, That such new order shall not affect any compensation paid under authority of the prior order."

[4] S. Rep. No. 1645, 74th Cong., 2d Sess.; H. R. Rep. No. 1892, 74th Cong., 1st Sess. The information before the Committees is attached to both reports and includes statements by the doctors who examined, x-rayed, and operated on Clark after the deputy commissioner's order; letters from the Compensation Commission discussing the history of the case; and a letter from the deputy commissioner to the sponsor of the act, Congressman Zioncheck, relating the deputy commissioner's participation in the case.

[5] See Note 2 *supra*. Section 22 of the Compensation Act (33 U. S. C. § 922), allowing the deputy commissioner to issue an amended award "on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner," was not available to Clark because at the time of his discovery of his continued disability the deputy commissioner could only take

After an unsuccessful attempt by appellants to enjoin a hearing under the private act;[6] a hearing was had and the deputy commissioner issued a new award granting Clark compensation for total disability from the date of the prior award, July 4, 1931, to January 5, 1939. Appellants brought two actions against Clark and the deputy commissioner seeking injunctions against the operation of the private act through prohibition of any further steps under the new award. The first bill was framed as an independent suit in equity; the second sought relief under the section of the Compensation Act providing for "injunction proceedings" to review awards made under the Act.[7] Under the Act of August 24, 1937,[8] a three-judge court was convened and the Attorney General duly notified. The causes having been transferred to the admiralty side of the court and consolidated for all purposes, the appellees filed exceptions claiming that the appellants had failed to state a cause of action. The court upheld the validity of the special act and sustained the appellee's exceptions.[9]

By direct appeal the appellants challenge the decree below, contending that the private act violates the due process clause of the Fifth Amendment. The argument of appellants is that the original award was an adjudication on which further review was barred prior to the enactment of the private act; that thereby rights and obligations were finally determined, the deprivation of which took from appellants a substantive immunity from further claims of Clark and created in Clark new substantive rights.

An award under the Longshoremen's and Harbor Workers' Compensation Act determines the liability of employer to employee.[10] But we do not agree that the immunity obtained by the lapse of the time for review is the type of immunity which protects its bene-

such action "during the term of an award." 44 Stat. 1437. On May 26, 1934, the section was amended (48 Stat. 807) to allow new awards because of changed conditions to be made "at any time prior to one year after the date of the last payment of compensation." Had this been in force at the time of Clark's injury, presumably it would have afforded him a remedy for a new award, but when it was passed more than a year had expired from the last payment of compensation.

[6] 95 F. (2d) 203.

[7] 44 Stat. 1436, § 21; 33 U. S. C. § 921.

[8] 50 Stat. 752, § 3; 28 U. S. C. § 380a.

[9] Paramino Lumber Co. v. Marshall, 27 F. Supp. 823; discussed in Comment, The Constitutionality of Private Acts of Congress (1940) 49 Yale L. J. 712.

[10] Crowell v. Benson, 285 U. S. 22.

ficiary from retroactive legislation authorizing review of the claim. This private act does not set aside a judgment, create a new right of action or direct the entry of an award. The hearing provided for is subject to the provisions of the general act for longshoremen's and harbor workers' compensation. It does not operate to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing injury had been known during the period of compensation, payments of the same amount due under the award authorized by this act would have been due to the employee.[11] In such circumstances we see no violation of the due process clause.

The principle underlying this conclusion is illustrated by *Graham & Foster* v. *Goodcell*.[12] There a retroactive act of the Congress barred recovery by taxpayers of payments for taxes, properly owing but collection of which was barred by limitation. At the time of the enactment of the controverted statute, the taxpayer had a right to recover the payment. Limitation had been permitted to run in favor of the taxpayer under a mistake of law. This Court upheld the legislation as consistent with due process on the ground that it was a curative act to remedy mistakes in administration where the remedy "can be applied without injustice."[13]

Rights obtained by an attaching creditor were subjected to the equity of a prior mortgage, invalid because improperly recorded, by a subsequent act in *McFaddin* v. *Evans-Snider-Buel Company*.[14] This Court refused to accept the argument that such a retroactive statute deprived the holder of the attachment lien, with notice of the prior equity, of property without due process.[15] Even more recently in *Carpenter* v. *Wabash Railway Company*,[16] we upheld as valid and applicable an act granting priority to railroad employees

[11] See note 5, *supra*.

[12] 282 U. S. 409.

[13] See the cases cited to support the conclusion: Forbes Boat Line v. Board of Commrs., 258 U. S. 338; United States v. Heinszen & Co., 206 U. S. 370; Tinco v. Forbes, 228 U. S. 549; see also Swayne & Hoyt, Ltd. v. United States, 300 U. S. 297, 302.

[14] 185 U. S. 505, 511.

[15] See Independent Pier Co. v. Norton, 12 F. Supp. 974, where the amendment of May 26, 1934, 33 U. S. C. § 922, construed as extending the time for review of an award under Longshoremen's and Harbor Workers' Compensation Act for one year retroactively as to a final award was held within due process. See also Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421.

[16] No. 230, October Term 1939, decided January 29, 1940.

for damages for personal injuries over other claimants in equity receiverships. The act there in question was passed while certiorari was pending in this Court from a contrary decision upon priority which we assumed to be correct. This ruling resulted from the "superior equities" of the employees.[17]

It is unimportant whether the claim persisted after the bar[18] or ended with the running of limitation.[19] To cure a fault of administration Congress may validly enact this act.

It is urged by appellant, however, that the equal protection clause of the Fourteenth Amendment should be read into the due process clause of the Fifth Amendment. If so read, it is argued, this private act violates the rule of equal protection. This conclusion, however, we find untenable. Private acts, as such, are not forbidden by the Constitution. That instrument contains no provision against private acts enacted by the federal government except for a prohibition of bills of attainder and grants of nobility.[20] It took an act of Congress to outlaw them in the territories,[21] even though the Fifth Amendment is applicable to the territories.[22] The states have different situations as to the validity of private acts.[23] The constitutions of many of the states, unlike the federal, forbid private legislation without regard to the Fourteenth Amendment of the Constitution of the United States.[24]

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[17] Cf. Danforth *v.* Groton Water Company, 178 Mass. 472; Dunbar *v.* Boston & Providence Railroad, 181 Mass. 383, 386; Robinson *v.* Robins Dry Dock & Repair Co., 238 N. Y. 271. But see for criticism Woodward *v.* Central Vermont Ry., 180 Mass. 599, 603; Ziccardi's Case, 287 Mass. 588, 591; Casieri's Case, 286 Mass. 50.

[18] Campbell *v.* Holt, 115 U. S. 620.

[19] William Danzer Co. *v.* Gulf R. R., 268 U. S. 633.

[20] Art. I, § 9, cls. 3 and 8.

[21] 24 Stat. 170; cf. Maynard *v.* Hill, 125 U. S. 190.

[22] Farrington *v.* Tokushige, 273 U. S. 285, 299.

[23] State courts have dealt with this question as a matter of the necessity of equality in due process before and after the passage of the Fourteenth Amendment. Holden *v.* James, 11 Mass. 396; State *v.* Industrial Accident Board, 94 Mont. 386; Matter of Decker *v.* Pouvailsmith Corp., 252 N. Y. 1, 7; Roles Shingle Co. *v.* Bergerson, 142 Ore. 131; Reiser *v.* William Tell Saving Fund Assoc., 39 Pa. 137, 146; State Bank *v.* Cooper, 2 Yerg. (Tenn.) 599, 605, 606; Tate's Ex'rs. *v.* Bell, 4 Yerg. (Tenn.) 202; Fisher's Negroes *v.* Dabbs, 6 Yerg. (Tenn.) 119; cf. 2 Cooley, Constitutional Limitations (8th ed.) 809.

[24] There are restrictions against the enactment of special legislation in the constitutions of all the states except Connecticut, Massachusetts, New Hampshire and Vermont. The following are typical provisions: (1) "The legislature shall not pass local or special laws concerning any of the following enumerated cases, ..."; followed by an enumeration of proscribed sub-

Nor can we say that this legislation is an excursion of the Congress into the judicial function.[25]

Affirmed.

Mr. Justice McREYNOLDS dissents.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

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Test:

Clerk, Supreme Court, U. S.

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jects which is concluded with the catchall, "where a general law can be made applicable." See Cal. Const., art. IV, § 25; Ky. Const., § 59. (2) "All laws, of a general nature, shall have a uniform operation throughout the State . . ." See Ohio Const., art. II, § 26. (3) "No special, private, or local law . . . shall be enacted in any case which is provided for by a general law. . . ." See Ala. Const., art. IV, § 105. (4) "The legislature shall have no power to suspend any general law for the benefit of any particular individual. . . ." See Tenn. Const., art. XI, § 8. Often there will be more than one provision in a constitution. The various provisions and decisions under them are discussed in Cloe and Marcus, Special and Local Legislation (1936) 24 Ky. L. J. 351, and Binney, Restrictions Upon Local and Special Legislation, p. 127, *et seq.*

[25] Johannessen *v.* United States, 225 U. S. 227, 241.

The state cases cited by appellants upon the question of the invasion of judicial authority involve statutes affecting judicial judgments rather than administrative orders and are therefore inapplicable:

Sanders *v.* Cabaniff, 43 Ala. 173; Trustees Fund *v.* Bailey, 10 Fla. 238; Dorsey *v.* Dorsey, 37 Md. 64; State *ex rel.* Flint *v.* Flint, 61 Minn. 539; Petition of Siblerud, 148 Minn. 347; Merrill *v.* Sherburne, 1 N. H. 199; Matter of Greene, 166 N. Y. 485; De Chastellux *v.* Fairchild, 15 Pa. 18; Taylor & Co. *v.* Place, 4 R. I. 324; In re Handley's Estate, 15 Utah 212; Ratcliffe *v.* Anderson, 31 Gratt. 105 (Va.); Marpole *v.* Cather's Adm'r, 78 Va. 239; Davis *v.* Menasha, 21 Wis. 491.

Compare Jones *v.* Mehan, 175 U. S. 1; Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 How. 421; Pocono Pines Assembly Hotels Co. *v.* United States, 73 Ct. Cl. 447.